[illegible]

Supreme Court of the United States

October Term, 1959

No. 35

Hector Sobrino, Jr., Et Ux.,
Appellants,

—v.—

West Haven Housing Authority,
Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

FILED SEPTEMBER 14, 1959
PROBABLE JURISDICTION NOTED APRIL 4, 1960

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., ET UX
Appellants,

—v.—

WEST HAVEN HOUSING AUTHORITY
Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

INDEX

	Page
Relevant Docket Entries	1
Writ, Summons and Complaint	2
Memorandum of decision, DiCenzo, George G., J., January 16, 1968	5
Judgment, January 16, 1968	7
Defendants' Appeal, January 17, 1968	9
Motion to waive surety bond on appeal, January 17, 1968	10
Exhibit A—Affidavit of Joanne S. Faulkner	11
Exhibit B—Financial Affidavit of Rector Simmons, Jr. and Rose Simmons	12
Objections to defendants' motion to waive surety bond on appeal	13

Page

Transcript of hearing on motion to waive Surety Bond, January 19, 1968 ... 14

Memorandum of decision on motion to waive surety bond on appeal ... 23

Motion to review ... 24

Exhibit 1—Answer by Defendants, appearing specially ... 27

Exhibit A—Notice to Quit ... 31

Exhibit B—Circular dated February 7, 1967 from Department of Housing and Urban Development, Don Hummel to Local Housing Authorities, etc. ... 32

Exhibit 2—Defendants' Trial Brief, January 9, 1968 ... 34

Exhibit 3—Memorandum of Decision, DiCenzo, George G., J. January 16, 1968 (copy) (omitted in printing) ... 53

Exhibit 4—Motion to waive surety bond on appeal, January 17, 1968 (copy) (omitted in printing) ... 53

Exhibit 5—Memorandum of decision on motion to waive surety bond on appeal (copy) (omitted in printing) ... 53

Motion to dismiss appeal, January 23, 1968 ... 54

Order re deposit of funds, DiCenzo, George G., J. February 29, 1968 ... 55

Opinion of Appellate Division, Jacobs, David H., J. ... 56

Judgment of Appellate Division ... 62

Motion to terminate stay of execution ... 63

Petition for certification by Supreme Court (excerpt)—Questions Presented ... 64

Supplementary judgment ... 65

Opinion of Appellate Division ... 66

Order denying certification, June 25, 1968 ... 70

Notice of appeal to the Supreme Court of the United States ... 71

Orders granting motion for leave to proceed in forma pauperis and noting probable jurisdiction ... 73

Relevant Docket Entries

Date	Docket Entries
7-24-67	Writ, summons and complaint
12-11-67	Answer & Special Defense
1-16-68	Judgment for Possession for Non-Payment of rent is entered. See Memo of Decision Di Cenzo J.
1-18-68	Defendant's Appeal—Receipt #8-04821
1-18-68	Motion to Waive Surety Bond on Appeal
1-19-68	Motion to Waive Surety Bond on Appeal denied, and finding made that appeal is taken for purposes of delay. See Memorandum of Decision. Di Cenzo J.
1-24-68	Motion to Review
1-25-68	Motion to Dismiss Appeal
2-28-68	Order from United States District Court re: $72.00 deposit
2-29-68	Order
3- 1-68	Judgment File, Appellate Division Opinion of Appellate Division
3-11-68	Notice of Petition for Certification
3-15-68	Motion to terminate stay of execution
3-21-68	Copy of Petition for Certification by Supreme Court
4-18-68	Supplementary Judgment, Appellate Division
4-18-68	Opinion of Appellate Division announced
6-28-68	Copy of Order Denying Certification dated 6-25-68 from Conn. Supreme Court
6-27-68	Notice of Appeal to the Supreme Court of the United States
7-26-68	Summary Process Execution filed and issued

TO THE SHERIFF OF THE COUNTY OF NEW HAVEN, HIS DEPUTY, OR ANY CONSTABLE OF THE TOWN OF WEST HAVEN, WITHIN SAID COUNTY, GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to summon

RECTOR SIMMONS, JR. and

ROSE SIMMONS, husband and wife, both of the Town of West Haven, County of New Haven, State of Connecticut (Apartment #4-B, Building F-B. Spring Heights, Glade Street);

to appear before the Circuit Court to be held at West Haven in and for the Eighth Judicial Circuit on the fourth Tuesday of July, 1967, then and there to answer unto

THE WEST HAVEN HOUSING AUTHORITY, a municipal corporation, organized and existing under the laws of the State of Connecticut, with an office at 15 Glade Street, in the Town of West Haven, County of New Haven and State of Connecticut;

in a civil action wherein the plaintiff complains and says:

1. On November 1, 1966, the plaintiff made a written lease to the defendants for the term of one month, renewable for successive terms of one month each, at a monthly rental of $72.00, payable in advance on the first day of each month, of the premises known as Apartment No. 4-B, Building F-B. Spring Heights, Glade Street, West Haven, Connecticut.

2. The defendants entered into possession of said premises and have ever since continued in possession thereof.

3. The defendants fail to pay the installments of rent due on May 1, 1967, June 1, 1967, and July 1, 1967.

4. On July 12, 1967, the plaintiff caused notice to be served on the defendants to vacate said premises on or before July 18, 1967, in accordance with the provisions

of the statute, a copy of said notice being attached hereto.

5. Although the time designated in said notice for the defendants to quit possession of said premises has passed, the defendants still continue in possession thereof and refuse to vacate the same.

The plaintiff claims a judgment of possession of said premises.

Catherine C. Shepard, of the Town of West Haven, is hereby recognized in $70.00 to prosecute, etc.

Of this Writ, with your doings endorsed thereon, make due service and return.

Dated at West Haven, Connecticut, this 19th day of July, 1967.

/s/ Dennis J. Donahue, Jr.
DENNIS J. DONAHUE, JR.
Commissioner of the Superior Court

Please enter the appearance of Philbin, Donahue & Votto for the plaintiff.

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN

SS: WEST HAVEN

JULY 19, 1967

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. AND ROSE SIMMONS

Then and there by virtue hereof, of this original writ, summons and complaint, I left with and in the hands of the within named defendant Rose Simmons and at the usual place of abode of the within named defendant Rector Simmons, Jr. at Apartment #4-B, Building F-B. Spring Heights, Glade Street, West Haven, Conn., a true and attested copy of the within original writ, summons and complaint with my endorsement thereon.

The within and foregoing is the original writ, summons and complaint with my doings thereon endorsed.

ATTEST:

/s/ Ralph Bernardo
RALPH BERNARDO
Deputy Sheriff
New Haven County

Fees:

Travel	$3.50
Copy	2.40
Service	.40
End	1.20
Total	$7.50

IN THE EIGHTH CIRCUIT COURT
AT EAST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. AND ROSE SIMMONS

MEMORANDUM OF DECISION—January 16, 1968

This is a summary process action commenced on July 19, 1967 where the plaintiff seeks a judgment of possession against the defendants for non-payment of rent. The word "summary" is defined in Ballentine and also in Webster to mean "short, concise, reduced into a narrow compass or into a few words." The record in this case clearly shows what can happen to a summary proceeding where the process is abused by dilatory tactics, defenses interposed to delay or obstruct the proceeding, and every effort made to delay a trial of the case on the merits.

The defendants filed a plea in abatement and appeared specially. The plaintiff demurred to this plea and the court (Kinmonth J.) sustained this demurrer on August 15, 1967.

Then on August 17, 1967 the defendants filed a motion for more specific statement and a motion for oyer. The plaintiff promptly complied, although it is logical and reasonable to assume that the defendants did have a copy of their lease and did have the notice to quit. Then when the plaintiff moved for a default for the defendants' failure to plead, the defendants objected and also interposed a demurrer. The court (Adorno J.) overruled the demurrer on October 2, 1967. Further motions were presented to the court (Sullivan J.) and to this court, and finally on December 4, 1967 this court ordered the defendants to file an answer within one week. The defendants complied with this order and the pleadings were closed on December 22, 1967. The case came to trial on its merits on January 9, 1968.

The credible evidence establishes a renewable monthly lease, and that the defendants are in possession. The service of a notice to quit is admitted. The evidence further establishes that rent in the amount of $72.00 per month in accordance with the terms of the lease has not been paid for the months of May, June and July of 1967. The evidence also establishes that no rent has been paid for any of the succeeding months of August, September, October, November and December of 1967.

The court finds the issues for the plaintiff, and accordingly a judgment for possession of the premises by plaintiff for non-payment of rent is entered.

/s/ DiCenzo J.

IN THE EIGHTH CIRCUIT COURT
HELD AT WEST HAVEN

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR., ROSE SIMMONS

Present Hon. George G. DiCenzo, Judge

JUDGMENT—January 16, 1968

This action, by writ and complaint dated July 19, 1967 claiming possession of certain leased premises in the City of West Haven therein described, to wit: Apartment #4-B, Building F-B, Spring Heights, Glade Street, West Haven, Connecticut, came to this Court on the 4th Tuesday of July, 1967 and thence to July 25, 1967 on which day the Defendants filed a Plea in Abatement to the same, and thence to August 4, 1967 on which day the Plaintiffs filed a Demurrer to Plea in Abatement and thence to August 15, 1967 when the parties appeared and were at issue to the Court on said Plea in Abatement and Demurrer as on file and the Court having heard the parties found the issues for the Plaintiff, (Kinmonth, J.) and thence to August 21, 1967 when the Defendants filed a Motion for Oyer which was granted with three days for compliance (Macdonald, J.) and a Motion for More Specific Statement and thence to August 23, 1967 when said Motion for More Specific Statement was granted by agreement of counsel with three days to comply (Macdonald, J.) and thence to August 24, 1967 when the Plaintiffs filed a Motion for Default for Failure to Plead and thence to August 28, 1967 when the Defendants filed Objections to Motion for Default for Failure to Plead and thence to September 11, 1967 when Motion for Default for Failure to Plead was denied and Objections to Motion for Default for Failure to Plead were sustained (Wise, J.); also on August 28, 1967 the Defendants filed

a Demurrer to the Complaint and thence to October 4, 1967 when the Demurrer was overruled (Adorno, J.) and thence to October 11, 1967 when Defendants appearing specially filed a Motion for Further Disclosure and Production and thence to October 23, 1967 when Objections to Motion for Further Disclosure and Production was filed by the Plaintiffs and thence to November 13, 1967 when the parties appeared and were at issue and item I of paragraph I was granted, the remaining items of paragraph I denied and paragraph II was denied on the Motion for Further Disclosure and Production filed by the Defendants (Sullivan, J.) and thence to November 21, 1967 when the Plaintiffs filed a Motion for Default for Failure to Plead, at said time Defendants filed a Motion for Non-Suit and thence to November 24, 1967 when Objections by the Defendants appearing specially to the Motion for Default for Failure to Plead and on said date the Plaintiffs filed Objections to Motion for Non-Suit and thence to December 4, 1967 when the parties appeared and were at issue on said Motions as on file and the Court having heard the parties denied the Plaintiffs Motion for Default for Failure to Plead, denied the Defendants Motion for Non-Suit, denied the Objections by the Defendants to the Motion for Default for Failure to Plead and sustained the Plaintiffs Objections to Motion for Non-Suit (DiCenzo, J.) and thence to the present time when the parties appeared and were at issue to the Court as on file.

The Court having heard the parties finds all the allegations in said complaint true.

Whereupon it is adjudged that the plaintiff recover possession of the said premises described in said complaint and recover costs taxed at

By the Court,

/s/ Serafino Ginnetti
Clerk of the Eighth Circuit Court

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

DEFENDANTS' APPEAL—January 17, 1968

The defendants hereby appeal to the appellate division of the circuit court from the judgment rendered herein and from the prior rulings of the court. The defendants (appellants) desire to have reviewed the court's conclusions upon the facts.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

You, Grace Bosse, of New Haven, deemed by me to be of sufficient financial responsibility to pay any costs which may be adjudged against Rector Simmons, Jr., and Rose Simmons on their appeal in the above entitled action, as surety, acknowledge yourself to be bound to the West Haven Housing Authority, plaintiff in said action, in a recognizance in the sum of $75.00, that the said Rector Simmons, Jr., and Rose Simmons will prosecute the foregoing appeal to full effect and pay any costs for which judgment may be rendered against them.

Dated at New Haven this 17th day of January, 1968.

/s/ Francis X. Dineen
Commissioner of the Superior Court

I certify that the foregoing appeal was filed on 1-18-, 1968, and that the defendants have paid the entry and record fees.

/s/ Jerome H. Hyatt
Clerk of the Circuit Court
Eighth Circuit

Receipt #8-04821

(Certification: omitted in printing)

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX.

MOTION TO WAIVE SURETY BOND ON APPEAL—
January 17, 1968

The defendants hereby move that the Court waive the provision of Section 52-542 Conn. Gen. Stat. that defendants post a bond with surety on appeal and that the Court accept a bond without surety, upon the following grounds:

1. The defendants are financially unable to post a bond with surety.
2. The defendants are unable to obtain a bond with surety unless they post full cash collateral. Annexed hereto as Exhibit A, is the affidavit of Joanne S. Faulkner attesting to this requirement.
3. The defendants are unable to post full cash collateral. Annexed hereto as Exhibit B is defendants' financial affidavit.
4. To require a bond with surety as a condition to defendants' appeal would violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America, as well as the provision of Article I, Section 10 of the Constitution of the State of Connecticut, which provides that justice shall not be sold.

WHEREFORE, the defendants request that in lieu of a bond with surety they be permitted to appeal upon a non-surety bond and upon depositing an amount equal to each months' rent as provided in the lease when it becomes due, in escrow with the New Haven Legal Assistance Association pending the disposition of this action.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

[ORDER Omitted in printing]

[CERTIFICATION Omitted in printing]

EXHIBIT A TO MOTION TO WAIVE SURETY BOND ON APPEAL

EIGHTH CIRCUIT COURT AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, ET UX

AFFIDAVIT—January 17, 1968

Joanne S. Faulkner, being duly sworn, deposes and says:

1. I am an attorney on the staff of the New Haven Legal Assistance Association Inc.

2. In an effort to obtain a bond with surety so that defendants could prosecute an appeal in the above case, I contacted the following companies:

Golden, O'Neil & Gebhardt, Inc.
Thompson & Peck
Daniel E. Fitzsimons Agency
Dennant & Company of Connecticut, Inc.
Robert Jacobs
T. Harold Fitzsimmons
Herman & Rice

3. Only T. Harold Fitzsimmons and Herman & Price expressed a willingness to write such a bond, but each required as a condition thereto that the defendants post cash collateral for the full amount of said bond.

/s/ Joanne S. Faulkner

[Jurat Omitted in printing]

EXHIBIT B TO MOTION TO WAIVE SURETY BOND ON APPEAL

[Title Omitted]

FINANCIAL AFFIDAVIT—January 17, 1968

Rector Simmons, Jr. and Rose M. Simmons, being duly sworn, depose and say:

1. I live with my spouse and three children in Apartment 4-B, Building F-B, Spring Heights, Glade Street, West Haven.

2. The family's only income is $85 a week net from Mr. Simmons' job at Sears, Roebuck & Co.

3. The family's assets are as follows:

Checking account	$ .15
Savings account	2.00
1959 Chevrolet	100.00

4. The weekly expenses for the family, including the three children, are as follows:

Food	$ 40.00
Furniture payment (Louis Gallo)	10.00
Electricity	3.00
Gas for car	5.00
Life Insurance	9.00
Clothing	10.00
TOTAL	$ 77.00

5. The family's debts are as follows:

Louis Gallo (furniture)	$325.00
Bernard Conti, M.D.	172.00
Harry Conti, M.D.	65.00
Hospitals	200.00

West Haven Housing Auth. vs. Rector Simmons, Et Ux.
Financial Affidavit
Page 2

Borden's	48.00
Southern New England Telephone Co.	50.00
TOTAL	$860.00

/s/ Rector J. Simmons, Jr.
RECTOR SIMMONS, JR.

/s/ Rose M. Simmons
ROSE M. SIMMONS

Sworn to before me this 17th day of January, 1968.

/s/ Francis X. Dineen
Commissioner, Superior Court

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONNECTICUT

CV8-677-5985

[Title Omitted]

OBJECTIONS TO DEFENDANTS' MOTION TO WAIVE SURETY BOND ON APPEAL—January 19, 1968

The plaintiff hereby objects to defendants' Motion To Waive Surety Bond on Appeal because the granting of said Motion would be in direct contradiction to the mandate of 52-542 of the Connecticut General Statutes and would prejudice plaintiff's rights by compelling said plaintiff to proceed on appeal without adequate surety by defendant.

The Plaintiff
West Haven Housing Authority
By PHILBIN, DONAHUE AND VOTTO

/s/ E. Michael Heffernan

[ORDER Omitted in printing]

[CERTIFICATION Omitted in printing]

CIRCUIT COURT, EIGHTH CIRCUIT
AT WEST HAVEN, STATE OF CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY*

vs.

RECTOR SIMMONS JR. ET UX

TRANSCRIPT OF HEARING ON MOTION TO WAIVE SURETY BOND—January 19, 1968

BEFORE THE HONORABLE GEORGE G. DICENZO

APPEARANCES:

FOR THE PLAINTIFF

PHILBIN, DONAHUE & VOTTO, 415 Main Street, West Haven, Connecticut

By: JOHN PHILBIN, ESQ.

FOR THE DEFENDANT

FRANCIS X. DINEEN, 169 Church Street, New Haven, Connecticut

By: JOANN FAULKNER, Attorney at Law

* Motion to Waive Surety Bond on Appeal

Reported by:

STANLEY WILDER
Court Reporter

[fol. 2] MRS. FAULKNER: As your Honor is aware, Section 52-542—

THE COURT: Let's get on to the law. To begin with we have trouble in this Circuit finding the statute, but with Mr. Ginnetti's help I have before me the section of 1961, 52-542, do I have the right statute?

MRS. FAULKNER: This statute was amended in 1961, Public Act 509, section four.

THE COURT: Is that the one we are dealing with now?

MRS. FAULKNER: Yes, that is right.

THE COURT: That hasn't been changed since?

MRS. FAULKNER: Not in our book.

THE COURT: Go ahead then, we got the same book.

MRS. FAULKNER: Section 52-542 requires the defendant taking an appeal in an action of summary process to post a bond with surety. We have alleged in our motion that the defendants are financially unable to post a bond with surety. We have attached to the motion a financial affidavit signed by both defendants, and all I can say about the financial affidavit is that it is pitiful. They have no reserves and they owe over eight hundred dollars in debts. I myself inquired of several bonding companies whether they are willing to write a bond with surety in a summary process appeal. The only two companies which were willing to write such a bond told me they would have to have full cash collateral. I don't exactly know how much the full amount would be, but [fol. 3] certainly it would be a minimum of three hundred dollars, possibly a maximum of one thousand dollars.

THE COURT: The rent was eighty-two dollars a month—

MRS. FAULKNER: Seventy-two dollars a month, your Honor.

THE COURT: In how many months do you think you can process the appeal assuming that you do all the things your office does?

MRS. FAULKNER: Assuming everything and this is down speedily, probably come in three months.

THE COURT: Thereafter, I suppose you will want to take an appeal to the Supreme Court?

MRS. FAULKNER: If we didn't win, of course.

THE COURT: So how many more months would that be?

MRS. FAULKNER: I'm not sure your Honor, I never done that before.

THE COURT: Well it would certainly be at least three more months.

MRS. FAULKNER: I would think so.

THE COURT: Let me ask you this. You say in your motion, you offer in lieu of the bond, if I understand your motion correctly, the deposit of the monthly rent when it becomes due with the New Haven Legal Assistance Association. How can the Court control the New Haven Legal Assistance Association?

MRS. FAULKNER: In what way?

THE COURT: How can the Court know that Mr. [fol. 4] Tenant has failed to pay his rent at the certain time to the Legal Assistance Association. Your his counsel. How do we know—what control do we have over it? Whereas, assuming that I decide that I want to entertain the motion from the standpoint of a favorable decision, don't you think the clerk of the court should be the recipient of the escrow fund rather than the Legal Assistance Association? At least the clerk of the court on January 1, March 1, or February 1, if the rent isn't paid and the plaintiff should want an execution, the order can provide for an issue of execution. This is step number one. What do you say to that?

MRS. FAULKNER: That was our original thought. We didn't know whether the court had such a procedure.

THE COURT: There isn't, excepting by order of the Court. If I should decide this case, that it appears to have merit, after I hear the other side, that the alternative method of providing security should be established, it would seem to me that rather than the Legal Assistance Association that the clerk of the court should be the recipient of the rent.

MRS. FAULKNER: That would be perfectly acceptable.

MR. PHILBIN: May it please the Court, of course, I object strenously to this. I would point to the Court's memorandum in deciding the case, where the Court pointed out, quite rightly, that the record in this case clearly shows what the—

[fol. 5] THE COURT: Let me ask you this. I'm entirely satisfied that all these tactics are for purposes of

delay. I'm throughly and completely satisfied of that. I'm also throughly satisfied that under the terms of this statute, that's why I had asked if I had the right statute, that if it appears to the Court who tried the case that the appeal was taken for the purpose of delay then, of course, we can no longer withhold execution.

MR. PHILBIN: That's correct your Honor, as I understand it.

THE COURT: I am of the opinion, I am very frank to say, to me it clearly appears that this, all these steps are taken for the purpose of delay, perhaps successfully so, but nevertheless that's what my feeling is. I don't think execution should be delayed. Now, what do you say to that?

MRS. FAULKNER: Your Honor, may I state for the record that I do not think these actions are taken for the purpose of delay. We submitted to your Honor a twenty-seven page—

THE COURT: I spent a weekend studying that twenty-seven page memorandum.

MRS. FAULKNER: We think we have excellent position on the law. Our appeal is taken for the purpose of upholding the law of the State of Connecticut as we understand it to the tenement law.

THE COURT: That's your position, I understand. [fol. 6] To me it appears rather clear, especially that you assert now that this person is without any funds, and going to continue there and make no provisions for the back payment at all and section 52-546, among other things, also carries a provision that the payment that the Court might require shall include all rents unpaid prior to the period of stay. Now as far as that, in the event of a stay I'm thinking along these lines, that I should state, find as a fact, that the appeal is taken for the purpose of delay, but permit the defendants to post with the clerk of the court the rent as it becomes due provided the plaintiff decides not to request an execution. But my feeling is this, that if the plaintiff feels, and I want to hear them on this, if the plaintiff feels that they should request an execution upon my finding that the appeal is taken for the purpose of delay then I think I

would deny the motion. Now that's the way I'm thinking about the matter. What are your thoughts on that?

MR. PHILBIN: Again your Honor, we would request an execution. I think inasmuch as the defendant here has brought a motion which sound in equity I think both parties should be heard as far as the equitable disposition. First I should remind the Court that the West Haven Housing Authority is a nonprofit Federal Agency sponsored authority which provides housing for low income families. The defendant in this case has paid no [fol. 7] rent since last April. He remained in possession of the premises and there are people who are willing to pay the rent and equally as poor as the defendant in this matter. Further I point out that in order to meet the expenses the other tenants, who again are low income families, have to bear the burden of making up the rent that Mr. Simmons is not paying. During this period of time, I further point out to the Court, I can provide evidence to this effect, that Mr. Simmons has been far from an ideal tenant besides disregarding the payment of rent. He races his automobile up and down the street.

THE COURT: That's not before me. I'm only concerned in this case with the question of nonpayment of rent.

MR. PHILBIN: Again I would point out to the Court that Mr. Simmons during this period of time has for the most part been employed. It's my understanding that he has been constantly employed since last August. He has never tendered any rent or offered to tender any rent. Further, in paragraph four of the defendants motion, the Fourteenth Amendment of the Constitution of the United States is set forth. I would point out that under the equal protection and due process clause that the Housing Authority again is entitled to equal protection. I don't think they are obligated to provide free housing for this man for a period which I believe would stretch on for another year or longer. He has already [fol. 8] had the benefit of seven months without paying rent. I doubt very much that the Housing Authority will be able to collect the back rent because of the financial situation. I would again point out to the Court that the statute is provided in order—

THE COURT: Well the question of collecting back rent, that's a legal action, that's a legal claim that the Housing Authority has that they can exercise in another manner. The only question before me is the summary process statute. The objective of the statute is to accomplish this. It's a summary process action. This course is showing how unsummary it can be. It would seem to me that if the plaintiff asserts the right to an execution on the theory that the appeal is taken for the purpose of delay then, of course, I respect that position. I will quite likely deny the motion in its entirety. The thought to substitute the clerk of the court for the Legal Assistance Association came to me during lunch time when I was discussing this problem with the clerk, and he said what Mrs. Faulkner suggested, perhaps there is no machinery set up for this, but he suggested that perhaps the money could be deposited in the bonding account and then let out as the Court would order, but—all right, is there anything further than that either of you want to offer?

MRS. FAULKNER: Your Honor, may I urge upon you that if you grant our motion to have the defendants [fol. 9] deposit the rent in court the landlord will not be hurt any further by delay in this proceedings. He will be protected because the monthly rent will be deposited. If he is successful on appeal he will be able to get the rent.

THE COURT: Do you suggest, if that should be the conclusion, that the clerk could issue an execution upon failure to pay?

MRS. FAULKNER: Yes.

THE COURT: In other words, you will be willing to stipulate on behalf of your clients that if the rent were not paid that the clerk would, may be empowered forthwith to issue an execution?

MRS. FAULKNER: Yes, your Honor.

THE COURT: That appeal to you all right?

MR. PHILBIN: Frankly it doesn't. During this period of time, it could take a considerable period of time, even if the tenant pays the fund into the clerk's office, they are not available to the plaintiff and we are still

as a practical matter losing the rents during that period of time. Eventually if we prevail and get this money this would be an extended period of time.

THE COURT: If the motion is denied, of course, the defendant hasn't complied with the statute number one, if the Court makes a finding that the appeal is made for the purpose of delay, of course, that is a a finding [fol. 10] subject to appeal, then it would seem to me that the plaintiff—the defendant would have to attack the issuance of an execution, if you applied for one, wouldn't the plaintiff, either through injunctive proceedings.

MR. PHILBIN: I would think so your Honor, yes.

THE COURT: All right, anything further Mrs. Faulkner on behalf of your position?

MRS. FAULKNER: Does your Honor intend to make a decision this afternoon?

THE COURT: I am going to try to. I am going to give it some thought. I understand this is important to both of you and that's why I arranged this special two o'clock hearing. To me it's still a summary process action and speed is important if the objective of the law is to be carried out. I would hope to be able to decide it today unless you would have some reason why I should delay, if you want to offer something further.

MRS. FAULKNER: No, your Honor, but I would like to go back to your possible decision that we are proceeding just for the purpose of delay. I have stated that we are not proceeding for the purpose of delay.

THE COURT: You told me that. I'm satisfied that you are. I'm satisfied that all these monkey wrenches that are thrown in here have been successful so far and keeping them in there and not paying any rent. The [fol. 11] legislature must have had something in mind when it wrote here, "unless it appears to the Judge who tried the case that the appeal was taken for the purpose of delay." Now what did the legislature have in mind when it wrote that into the law?

MR. FAULKNER: I think it had in mind a frivolous appeal. I think we have several excellent issues which are backed up by the State of Connecticut.

THE COURT: There's one thing missing, that's good faith.

MRS. FAULKNER: I believe we have acted in good faith.

THE COURT: I'm not talking about you, I'm talking about your clients. I'm not talking about you or your office, I'm talking about the clients. You just sit back and review this for a minute. These people have made no effort to pay anybody anything in months, no token effort.

MRS. FAULKNER: Your Honor, they would have made an effort if these proceedings had been withdrawn.

THE COURT: They haven't even gone to anybody, here's something on account.

MRS. FAULKNER: Then I may point out in addition that my client suffered a nervous breakdown, was out of work—

THE COURT: The law doesn't provide for that.

MRS. FAULKNER: If you have particular reasons [fol. 12] why that's so I can answer that.

THE COURT: I set them all out in the memorandum of decision. I set most of them out. For example, let me illustrate. You filed a motion for oyer, Your client has a copy of the lease.

MRS. FAULKNER: Your Honor our clients did not have a copy of the lease and we did not have a copy of the lease. The first time we saw the lease was when the oyer was complied with.

THE COURT: Then you filed a request for a production of notice to quit. Your clients had a notice to quit, it was served on him.

MRS. FAULKNER: In order to plead to the notice to quit it had to be in the record. I don't know whether we had that or not.

THE COURT: Let's not debate it further. I am satisfied that the appeal is for the purpose of delay. I suspect I am going to make that finding. Now in the light of that I also suspect, I am going to review this a little more carefully, I also suspect I am going to deny it, your motion, as it is presently presented before me because I dont' think it's in compliance with the law,

and if the plaintiff asserts that they want to proceed to obtain an execution, if they can, then I won't give any further thought to the alternative plan of substituting the clerk for the Legal Assistance Association. Anything further?

[fol. 13] MR. PHILBIN: Your Honor, I think you inquired as whether or not we intended to pursue the opportunity to obtain—

THE COURT: You do?

MR. PHILBIN: We do your Honor.

THE COURT: Thank you.

MR. PHILBIN: I do not know whether or not this is an order, as the time to appeal has not—

THE COURT: Well this is a bit premature. Actually an appeal has been filed. Have you got a copy of it?

MR. PHILBIN: I have your Honor.

THE COURT: Defendants appeal was filed on the seventeenth and recorded by the clerk on the eighteenth, yesterday, so for all purposes there is an appeal, it has been filed.

THE CLERK: There is no bond.

THE COURT: But it has been filed nevertheless. Whether they can perfect their appeal as is is another story. As the matter stands now there is an appeal. This motion might be all right if I formally and when I formally deny their motion to substitute for the bond.

MR. PHILBIN: Very well your Honor.

[fol. 14] [Reporter's and Clerk's Certificate to foregoing transcript omitted in printing.]

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

MEMORANDUM OF DECISION ON MOTION TO WAIVE SURETY BOND ON APPEAL—January 19, 1968

By agreement of the parties and their counsel the Court assigned the defendants' motion to waive surety bond on appeal for a special hearing on January 19, 1968 at two p.m. at which time counsel appeared and were heard pro and con on the instant motion.

The Court makes the following finding:

1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due;

2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding;

3) the instant motion is another effort to avoid the clear obligation required by Section 52-542 of the Connecticut General Statutes requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents that may accrue;

4) it clearly appears to this court, having tried this case, that this appeal is being taken for the purpose of delay.

Therefore, the motion to waive the requirements of Section 52-542 pertaining to a surety bond is denied.

/s/ DiCenzo
J.

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV8-677-598 AP

[Title Omitted]

MOTION TO REVIEW—January 24, 1968

The defendants, Rector Simmons Jr., and Rose Simmons, through their attorney, hereby move this Court pursuant to sections 1023 and 693 of the Connecticut Practice Book, to review and vacate the action of the Eighth Circuit Court in denying the defendants' Motion to Waive Surety Bond on Appeal and in finding that it appears that the defendants' Appeal is being taken for the purpose of delay, and in support thereof, the defendants respectfully represent:

1. On January 16, 1968, after a trial to the Court, judgment of possession was rendered in this summary process action by the Eighth Circuit Court in favor of the plaintiff and against the defendants.

2. The defendants believe that they have valid defenses to this action, and the defendants wish an opportunity to be heard with respect to these defenses by the Appellate Division of the Circuit Court. The defendants listed seven (7) special defenses in their Answer. A copy of said answer is attached hereto and marked Exhibit 1. Six of said defenses were thoroughly briefed by the defendants, and a trial brief was submitted to the trial Court at the close of the trial. A copy of said trial brief is attached hereto and marked Exhibit 2.

3. No Reply Brief was filed by the plaintiff, and none of the said defenses was discussed or adverted to by the trial judge in his Memorandum of Decision. A copy of said Memorandum of Decision is attached hereto and marked Exhibit 3.

4. On January 18, 1968, the defendants filed their Appeal and a Motion to Waive Surety Bond on the Appeal. A copy of said Motion to Waive Surety Bond on the Appeal is attached hereto and marked Exhibit 4.

5. On January 19, 1968, the Eighth Circuit Court denied the defendants' Motion to Waive Surety Bond on Appeal and said Court made a finding that it appears that said Appeal is being taken for the purpose of delay. A copy of the Decision of the Court is attached hereto and marked Exhibit 5.

6. The defendants are indigent and they are unable to afford the price of a surety for a bond. The provision of Section 52-542 which requires a bond with surety as a condition to defendants' Appeal violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America, as well as the Provision of Article One (1), Section 10, of the Constitution of the State of Connecticut, which provides that justice shall not be sold.

7. With respect to the aforesaid finding that this Appeal is being taken for the purpose of delay, the defendants maintain that this Appeal is being taken to vindicate their rights and not for the purpose of delay. In addition, no hearing was held by the Eighth Circuit Court on the question of whether this Appeal was being taken for the purpose of delay.

8. There is no basis whatsoever in the record of the case to support the finding that the appeal of the plaintiffs herein is being taken for the purpose of delay and such a finding is arbitrary and unreasonable, and eviction of the defendants based on said finding would deprive them of liberty and property without due process of law and deny them the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

9. Defendants proved the essential allegations of their defenses. The allegations of fact in the First, Second, and Third Special Defenses were admitted by plaintiff. The following was established by uncontradicted testimony at trial:

> Fourth Special Defense: On April 24, 1967, plaintiff's executive director informed defendants that they were going to be evicted. Defendants relied on this statement in not tendering rent thereafter.

Defendants had never paid rent on the first of the month, and plaintiff complained only once.

Fifth Special Defense: Defendants' apartment is in a building "which is rented, leased, let or hired out to be occupied, or is arranged or designed to be occupied, or is occupied, as the home or residence of three or more families, living independently of each other, and doing their cooking upon the premises," and having a common right in the yards. The building is not more than three stories in height, is served by a sidewalk as the same main means of ingress and egress and is contained within firewalls. The only certificate of occupancy issued to plaintiff does not state that the building conforms in all respects to the requirements of the Tenement House Act.

Sixth Special Defense. Plaintiff did not demand of the defendants the rent, nonpayment of which was the basis of plaintiff's action.

10. The provision of Section 52-542, C.G.S.A., which permits the trial judge to terminate a stay of execution pending appeal, upon his finding that it appears that an appeal is taken for the purpose of delay, allows a trial judge the virtually unlimited and unreviewable discretion to prevent appellate review of any of his own rulings or decisions in a summary process proceeding and violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

[Order Omitted in printing]

[Certification Omitted in printing]

EXHIBIT 1 TO MOTION TO REVIEW

EIGHTH CIRCUIT COURT
AT WEST HAVEN

December 11, 1967

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

ANSWER BY THE DEFENDANTS, APPEARING SPECIALLY

The defendants herein, not waiving but expressly reserving all their objections to the jurisdiction and appearing specially, hereby answer the plaintiff's complaint:

1. So much of paragraph (1) as alleges a monthly rental in in the amount of $72.00 per month is denied, and the remainder of paragraph (1) is admitted.
2. Paragraph (2) is admitted.
3. Paragraph (3) is denied.
4. So much of paragraph (4) as alleges that on July 12, 1967 the plaintiff caused notice to be served on the defendants to vacate the premises on or before July 18, 1967 is admitted, and the remainder of paragraph (4) is denied.
5. Paragraph (5) is admitted.

FIRST SPECIAL DEFENSE

1. At the time of the commencement of this action there was, and there still is, another action docketed as CV8-676-5856 pending in this court between the same parties and demanding the same relief.
2. This Court, therefore, has no jurisdiction over this action.

SECOND SPECIAL DEFENSE

1. The writ, summons and Complaint, which were returnable on July 25, 1967, were not filed with the clerk of this court until July 24, 1967.

2. Section 52-48a of the General Statute requires that all process in the Circuit Court be returned to the clerk of said court at least three days before the return date of such process.

3. This court, therefore, has no jurisdiction over this action.

THIRD SPECIAL DEFENSE

1. Paragraph (2) of the lease between the plaintiff and the defendants provides that the lease may be terminated without cause provided that prior to the 15th day of any month written notice is given to terminate the lease on the last day of said month.

2. Paragraph (11) of the lease between the plaintiff and the defendants provides that if the tenant breaches any covenant of the lease, the lease may be terminated upon 30 days notice from the management.

3. The plaintiff has at no time given to the defendants the notice required by paragraph (2) of the lease or the notice required by paragraph (11) of the lease, and consequently the lease has not terminated.

FOURTH SPECIAL DEFENSE

1. There has been a rule and practice in effect between the plaintiff and its tenants, and in effect between the plaintiff and the defendant, whereby a reasonable period of time (to wit, approximately two weeks) after the first day of the month is allowed by the plaintiff for the payment of the monthly rent.

2. On May 8, 1967, the plaintiff caused to be served upon the defendants a notice to quit, dated May 5, 1967, notifying the defendants to quit possession of their apartment on or before May 16, 1967. A copy of said notice is attached hereto and marked, Exhibit A.

3. On June 5, 1967, the plaintiff caused to be served upon the defendants a writ, summons and complaint in

a summary process action setting forth that the aforesaid notice to quit had been served and demanding a judgment of possession of the defendants' apartment. Said action is now pending in this court and is docketed as No. CV8-676-5856.

4. The plaintiff by its acts of signing, issuing and serving upon the defendants the aforesaid notice to quit excused the defendants from paying rent for the month of May 1967 and for any subsequent month, until said notice is withdrawn, and by said acts the plaintiff waived all rights for the payment of rent for the month of May 1967 and for any subsequent month until said notice is withdrawn, and by said acts the plaintiff is estopped to assert that the defendants were obliged to pay rent for the month of May 1967 and for any subsequent month, until said notice is withdrawn, and because of said acts the defendants were not required to tender rent for the month of May 1967 or for any subsequent month, until said notice is withdrawn.

FIFTH SPECIAL DEFENSE

1. The premises known as "Building F-B, Glade Street, Spring Heights, West Haven, Connecticut, owned by the plaintiff and occupied by the defendants constitute a tenement house, or a portion thereof, as defined by Section 19-342 of the General Statutes of Connecticut.

2. Section 19-370 of the General Statutes of Connecticut provides that no tenement house shall be occupied for human habitation until the issuance of a certificate that such building conforms in all respects to the requirements of Chapter 352 of the General Statutes.

3. Section 19-371 of the General Statutes provides that if a tenement house is used for human habitation when it does not have the certificate described in paragraph (2) above, no rent shall be recoverable by the owner while there is no certificate, and no action or special proceedings shall be maintained therefore.

4. The plaintiff, therefore, cannot bring this action based on non-payment of rent as no rent was in fact due and owing to the plaintiff.

SIXTH SPECIAL DEFENSE

1. The plaintiff has never made demand for the rent from the defendants.
2. Such demand is a necessary condition precedent to the bringing of an action in summary process.
3. This action, therefore, cannot be maintained by the plaintiff.

SEVENTH SPECIAL DEFENSE

1. On or about February 7, 1967, the Department of Housing and Urban Development at Washington D.C. issued a letter regarding certain procedures to be followed by local housing authorities in the event of termination of tenancy. A copy of said letter is attached hereto and marked, Exhibit B.
2. Said letter and the rules contained therein applies to the West Haven Housing Authority and said rules and regulations are part of the rules and regulations referred to in the lease in this matter.
3. The plaintiff has failed to comply with said letter and the rules contained therein and therefore the plaintiff cannot maintain this summary process action at this time.

THE DEFENDANTS

By: .....
FRANCIS X. DINEEN
Their Attorney,
Appearing Specially

[Certification Omitted in printing]

EXHIBIT A TO ANSWER

Mr. & Mrs. Rector Simmons, Jr.
Apartment 4B—Bldg. F-B Spring Heights
West Haven, Connecticut

I hereby give you notice to quit possession of the house, land, building, apartments and premises, now occupied by you at Apt. 4B—Bldg. F-B, Spring Heights, in the City and Town of West Haven, State of Connecticut, on or before the 16th day of May, 1967.

Dated at West Haven, Conn. this 5th day of May, 1967.

West Haven Housing Authority

PHILBIN, DONAHUE & VOTTO
By /s/ John J. Donahue
Its attorneys

EXHIBIT B TO ANSWER

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D. C. 20410

Office of the Assistant Secretary
For Renewal and Housing Assistance

Circular
2-7-67

TO: Local Housing Authorities
Assistant Regional Administrators for Housing Assistance
HAA Division and Branch Heads

FROM: Don Hummel

SUBJECT: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

/s/ [Illegible]
Assistant Secertary for Renewal
and Housing Assistance

EXHIBIT 2 TO MOTION TO REVIEW

EIGHTH CIRCUIT COURT
AT WEST HAVEN

January 9, 1968

No. CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR., AND ROSE SIMMONS

DEFENDANTS' TRIAL BRIEF

I. Statement of Facts

This is a summary process action where the plaintiff seeks a judgment of possession against the defendants for the stated reason of non-payment of rent. The defendants claim both that the plaintiff has no substantive right to bring this action and that even if it did have such a right, it has not followed the correct procedure and, therefore, it ought not to be given judgment.

This action was commenced on July 19, 1967, by the service of the Writ on the defendants. This Writ was returnable on the fourth Tuesday of July, 1967, (July 25, 1967) but the plaintiff did not return the original writ, summons and complaint to the clerk until July 24, 1967. The defendants contend that this late return violated the provisions of Section 52-48a CGS and that, therefore, this action was not properly commenced.

Another summary process action was then, and still is, pending in this court between the parties hereto. The defendants therefore filed a timely plea in abatement and a special appearance dated July 25, 1967, based on the prior action between the parties, and on the late return of the writ. The plaintiff demurred to this plea on August 3, 1967, (the dates here given are the dates of the pleadings, not the dates of filing) and the matter was heard on August 9, 1967, before Kinmonth, J., who

treating the demurrer as an answer, sustained the demurrer. To preserve its right to appeal the defendants have since appeared specially, reserving the right to contest the jurisdiction further.

On August 22, 1967, plaintiff filed, in response to defendant's motion for oyer, a copy of the lease, and on August 23, 1967, it filed a copy of the notice to quit. On August 25, 1967, the defendants demurred to the complaint on the grounds that the lease, filed in response to the oyer of the defendants, revealed that by its own terms it could be terminated by not less than 30-days notice for the breach of a covenant therein while the notice to quit filed in response to the motion for a more specific statement showed that only five days notice had in fact been given.

On September 29, 1967, the demurrer was heard before Adorno, J. It was overruled on October 2, 1967, on the grounds that the notice to quit was a valid termination of the lease, notwithstanding its terms. The defendants take issue with this view, and they renew their defense here.

On August 25, 1967, the defendants filed a motion for disclosure and production. This was based on paragraph (12) of the lease which incorporates therein by reference certain conditions of occupancy and rules and regulations. This motion was granted by the clerk on August 28, 1967. Plaintiff failed to comply with this motion, although it did file an untimely objection. On December 4, 1967, DiCenzo, J., stated that he would not require compliance with this disclosure.

On October 10, 1967, the defendant moved for further disclosure and production as to whether plaintiff had obtained the tenement house certificate of occupancy required by Section 19-370 C.G.S. The plaintiff objected to this motion on October 20, 1967, and its objections were heard on November 13, 1967, before Sullivan, J., who sustained the plaintiffs objections in part and overruled them in part. The plaintiff filed a certificate of occupancy issued under Section 19-400 C.G.S., but failed to comply with the order of the court. On November 17, 1967, the defendants moved to nonsuit the plaintiff for

non-compliance with this order and with the disclosure order of August 28, 1967.

On December 4, 1967, the court, by DiCenzo, J., denied the defendants' motion, accepted an oral compliance with Judge Sullivan's order, and ordered the defendants to file an answer within one week. On December 11, 1967, the defendants complied with this order, and on December 22, 1967, the plaintiff closed the pleadings by making a reply to the answer.

II. Argument

A. *The Pendency of a Prior Action in the Same Court Between the Same Parties and Demanding the Same Relief Requires the Court to Abate the Second Action*

The law in Connecticut on this matter is simple and directly on point:

> Where the parties are the same and the second suit is for the same matter, cause or thing, or the same object is to be attained, as in the first suit and in the same jurisdiction, the second shall abate and is dismissed.
>
> *Hatch* v. *Spofford*, 22 Conn. 485, 495, (1853).

There are some recent exceptions to the general rule, all based on the principle that the collection of debts should be allowed to proceed by all proper means. See *Brochin* v. *Conn. Importing Co.*, 137 Conn. 350 (1950); *Cole* v. *The Associated Construction Co.*, 141 Conn. 49 (1954).

There is no doubt that CV8-676-5856 is in the same court, or that it involves the same parties, or that it involves the same relief sought by the plaintiff. The situation fits precisely within the rule stated in *Hatch* v. *Spofford*, supra.

The prior action is based on the claim that the defendants, by committing a nuisance on May 1, 1967, breached the lease and on May 8, 1967, the plaintiff caused that lease to be terminated by serving a notice to quit upon the defendants. The present action is based on the claim

that on May 1, 1967, as well as June 1, 1967, and July 1, 1967, the defendants failed to pay the rent due. To this the defendants would make three comments:

1. The only cause of action in summary process is that the lease has terminated, for whatever reason. §§ 52-532 C.G.S. "The necessary and only basis of a summary process proceeding is that the lease has terminated." *Webb* v. *Ambler*, 125 Conn. 543, 550 (1939).

2. The plaintiff's cause of action in each case arose on May 1, 1967. There was no excuse for the plaintiff not including this cause of action in his earlier writ. In July, when the plaintiff commenced this action, it was open for it to move to amend its original complaint, yet it did not do so.

3. If the first action is sustained, then the second is unnecessary and it was brought for the purpose of harassing the defendants through the use of multiple law suits.

It should be noted at this point that plaintiff demurred to the plea in abatement, in effect challenging the propriety of such a plea. On argument, however, the plaintiff entirely abandoned this contention, as it must. There can be no question that an action may properly be abated where there is a prior action in the same court between the same parties for the same cause of action. Connecticut Practice Book, Form 250 (1963); Kaye & Moller, P.B. Ann. 156 (1966); Stephenson, Conn. Civ. Prac. § 78 (a) 1959.

This action, therefore, should have been abated, and the Court has no jurisdiction to proceed in it further.

B. *The Court Has No Jurisdiction of This Action Since Plaintiff's Writ Was Not Timely Returned.*

Plaintiff's writ was returnable to the Court on July 25, 1967, but was not actually returned to the clerk's office until July 24, 1967, in violation of § 52-48a C.G.S.

The defendants admit that the only reported case on the subject, *Fresdall* v. *Thomen*, 2 Conn. Cir. 109 (18 Cir. 1963), is directly against this contention. Nevertheless, the ruling is not binding on this Court and the

defendants respectfully submit that it is based on an incorrect reading of § 52-48a C.G.S. once the legislative intent is taken into account.

The statute in question reads as follows:

> Process in all civil actions, except summary process actions, brought to the circuit court shall be made returnable on any Tuesday in any month and all such process shall be made returnable within 60 days after the date of such process. Such process shall be served at least six days before the return day and returned to the clerk of the court at least three days before such date. The return day in any summary process action may be any weekday, Monday through Saturday, except a holiday.

Section 52-48a, C.G.S. Section 52-532 modifies this section as to summary process by providing that the complaint may "be made returnable six days, inclusive, after service on the defendant."

Prior to the creation of the circuit court summary process actions were tried by the trial justices. In those courts process was served six days, inclusive, before the return day, Section 52-46 Conn. Gen. Stat. (1949 rev.) and was returned to the court "at least 24 hours before the opening of court on the return day." Section 52-47 Conn. Gen. Stat. (1949 rev.) Parenthetically, it should be noted that plaintiff did not even comply with this 24 hour requirement in returning its writ.

When the circuit court was given jurisdiction of summary process actions, the provision for return to the clerk at least 24 hours before the opening of court on the return day was repealed and § 52-48a was added.

Thus, the only provision for return to the court of process in civil actions is that found in § 52-48a, "Such process shall be . . . returned to the clerk of the court at least three days before such date."

In reading the language of Section 52-48a it is not clear whether the three-day return of process requirement applies to summary process. Although summary process is specifically excluded in the beginning of the first sentence, the words "all such process" later on in the sen-

tence would seem to bring it back for the following provisions. Otherwise, the words "all such process" would be superfluous and unnecessary. It is a standard rule of statutory interpretation that an exclusionary provision should be read as narrowly as possible.

In support of this position, William Moller, in his commentary on Connecticut Civil Practice in Vol. 24 Conn. Gen. Stat. Ann. states: "most actions follow the normal process of service and return. The most notable exception is the process of eviction known as summary process. This action can be returned to the Circuit Court on any day, Monday through Saturday, *as long as the six day requirement and three day requirement of service and return is followed* (52-48a)." (Emphasis added.) Conn. Gen. Stat. Ann. Vol 24, p xvii.

The three day requirement serves the purpose of orderly procedure. If the plaintiff need not return the writ, summons and complaint in a summary process action to the clerk three days before the return date, the defendant might not have time to properly plead in abatement. Conn. Prac. Book § 76 (1963).

The plea in abatement may be of vital importance to the defendant's rights. Thus if it were desired to show improper service by the sheriff a plea in abatement would be in order. But the facts of improper service might not appear save on the writ returned to the clerk, and if such return were made after the time for a plea in abatement had passed, or even shortly before that point, a valid defense might be lost.

Since summary process is narrowly construed and strictly followed, *Jo-Mark Sand & Gravel Co.* v. *Pantanella*, 139 Conn. 598, 601 (1953), and since the three-day return of process requirement replaced the old 24-hour requirement of Section 52-47, this Court should have abated this action and this Court has no jurisdiction to proceed in it further.

C. *The Lease for the Premises in Question Has Never Been Terminated, and Therefore Summary Process Is Not Available.*

A lease is a contract. *Cohn* v. *Fennelly*, 138 Conn. 474, 476 (1952). The Supreme Court of Connecticut has stated:

> In construing it, three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible.
>
> *Ingalls* v. *Roger Smith Hotels Corp.*, 143 Conn. 1, 6 (1955).

Furthermore, the court there stated that "if the language is ambiguous, the construction which favors the lessee should be adopted." *Ibid.*, See also *Conn. Land & Mort. Co.* v. *Lesser*, 136 Conn. 580, 583 (1950).

Using these principles of construction, it becomes clear that the lease involved in this case does not, in any case or under any permissible construction, give to the plaintiff the right to terminate the defendants' estate on five days notice. The plaintiff, under the lease that it drafted, reserved the power to terminate the lease only in the following circumstances:

1— Paragraph (2) of the lease provides that either party may terminate the lease as of the last day of any month, if notice is given to the other party before the fifteenth day of that month.

2— Paragraph (3) of the lease provides that if the size of the tenant's family shall change in such a manner as to warrant either a larger or a smaller dwelling unit, and if the tenant accepts the lessor's offer of such a unit, the lease shall terminate in thirty days.

3— Paragraph (4) of the lease provides that the tenant's failure to notify the management and obtain permission for additional persons to live there shall be cause for the termination of the lease.

4— Paragraph (5) provides that if the tenant's income exceeds the maximum standard of income eligible for public housing, then management may terminate the lease and the tenant be forced to vacate after six months.

5— Paragraph (8) provides that if the premises are so damaged by fire as to be untenantable, the lease will automatically terminate.

6— Paragraph (11) of the lease provides that "in the event that the tenant does misrepresent or has misrepresented any material fact in his application, or in any statement submitted to Management as required by Paragraph (8) [*sic*, should probably be Paragraph (9)] herein, or *if the Tenant breaches any covenant of this Lease*, this Lease may be terminated upon thirty (30) day's notice from the Management. . . ."

The agreement of the tenant to pay rent is one of the fundamental covenants of the landlord-tenant relationship. In two paragraphs of the lease the tenant agrees to pay rent. Paragraph (7) provides that "the Tenant is to pay the rent at Management offices on the first day of each month. . . ." Paragraph (9) contains the statement "the Tenant agrees to pay rentals in compliance with the 'Schedule of Dwelling Rents' adopted by Management." Thus, it would appear that if the tenant were to default in the payment of his rent, the landlord would have the remedy he agreed upon in Paragraph (11): the termination of the lease on thirty days notice.

The plaintiff, however, admits that it did not comply with the provisions of Paragraph (11). If, therefore, the lease has been terminated, it must have been under some other provision of the lease or under a provision of law permitting the termination of the lease.

The plaintiff has admitted that it did not comply with Paragraph (2) in its purported termination. Paragraphs (3), (4), (5) and (8) are by their terms completely irrelevant to the case.

No provision of law permits the termination of a lease for non-payment where the lease does not so provide. Only where the lease so provides, may it be terminated for non-payment. *Macha* v. *Eastern Conn. Training School*, 24 Conn. Sup. 151 (1962).

The law was aptly stated in *Bowman* v. *Foot*, 29 Conn. 331, 337 (1860).

> Our statute of summary process recognizes no other termination of leases than such as is effected by force of the contract itself. It supersedes none of the common law remedies of the landlord, except in respect of the notice to quit and the form of procedure by action. It follows that the question whether the tenants rights have ceased, must be settled according to a common law interpretation of the instrument of demise. In some states, precise legal consequences are annexed by statute to the non-payment of rent, and the lessee is arbitrarily divested of his estate. Our statutes contain no such provision.

and in *In re Edgewood Park Jr. College, Inc.*, 123 Conn. 74, 77 (1937)

> Apart from statute or express provisions of the lease, the tenants' non-payment of the rent or other breach of covenant will not justify his eviction by the landlord.

A stipulation terminating the lease for non-payment, to be effective, must be clearly and expressly stated. *Davidson* v. *Poli*, 102 Conn. 692, 695 (1925); *Rosa* v. *Cristina*, 135 Conn. 364 (1949). This rule goes back to the case of *Lang* v. *Young*, 34 Conn. 526, 529 (1868) where the Court said:

> The lease must expire "by reason of some express stipulation thereof," is the language of the statute, not by inference, not by operation of law, but by the express stipulation of the parties that the lease shall expire or become void on the non-fulfillment of the condition.

The lease must have terminated by such a clear and express stipulation in order to make summary process

available. *Davidson* v. *Poli*, 102 Conn. 692, 695 (1925); *Rosa* v. *Cristina*, 135 Conn. 364, 367 (1949); *Lang* v. *Young*, 34 Conn. 526, 528 (1828); *Jo-Mark Sand & Gravel Co.* v. *Pantanella*, 139 Conn. 598 (1953); *Feneck* v. *Nowakowski*, 146 Conn. 434, 436 (1959); *Webb* v. *Ambler*, 125 Conn. 543, 550 (1939); *Fortuna, Inc.* v. *Lyons*, 23 Conn. Sup. 389 (1962). There is no such clear or express provision here permitting termination for non-payment of rent.

The ruling of the Court, Adorno, J., on the demurrer found in Paragraph (7) of the lease authority to terminate the lease for the non-payment of rent. It is respectfully submitted to the Court that this ruling was in error.

The trial judge is not bound by the ruling made on a demurrer in the same case. *Albrecht* v. *Rubinstein*, 135 Conn. 243 (1948); *Santoro* v. *Kleinberger*, 115 Conn. 631 (1932). Upon trial the question is presented to the court for a new hearing on the law, as well as for a first hearing on the facts.

Paragraph (7) is divided by a semi-colon into two parts. The first states that the tenant shall pay the rent at the Management offices on the first day of each month, without requiring a statement or a notice therefor. The second part states that the tenant agrees to "pay when billed, for any damage done to the premises . . . which charges are hereby designated as additional rent, for default in payment of which the Management shall be entitled to all remedies for non-payment of rent."

The court on the demurrer felt that this meant that if *any* rent were unpaid, then, despite Paragraph (11), the plaintiff could issue a five day notice to quit under section 52-532 Conn. Gen. Stat. But it is submitted that the only proper interpretation of this provision is that the cost of repairs will be considered as rent, and therefore subject to the covenants of the first part of Paragraph (7) and of Paragraph (9), and that if the cost of damages, as rent, is not paid, then the landlord may proceed under Paragraph (11), or any other paragraph applicable, to terminate the lease and then to proceed under the summary process statute.

Even if there is an ambiguity in Paragraph (7), the ambiguity must be resolved in favor of the tenant, under the rule of *Inqualls* v. *Roger Smith Hotels Corp.*, 143 Conn. 1, 6 (1955).

Plaintiff is a public housing authority operating in the State of Connecticut. It must be presumed to know the law of this State, that non-payment is not grounds for termination of the lease unless the lease clearly and expressly so stipulates. Its failure to include such a stipulation is indicative of its intent not to have the benefit thereof.

Plaintiff's tenants are low-income people who have difficulty in relocating. Plaintiff may have omitted the non-payment stipulation to avoid imposing on its tenants the hardship of having to move on the short notice possible where non-payment is stipulated as ground for termination.

The lease has not been terminated in any way according to its own terms, and is still in full force and effect. The action of summary process, therefore, will not lie in this case.

D. *The Plaintiff Has Waived Its Right to Claim Non-Payment of Rent for the Months in Question, or It Has Become Estopped to Do So.*

The legal question posed by this defense is whether a plaintiff landlord who first serves a notice to quit possession and then commences and maintains a summary process action based on the termination of the lease will be allowed to bring, while the first action is pending, a second summary process action based on the supposed non-payment of rent after the first action was begun.

It should be emphasized that the question is not whether the lease was actually terminated by the first notice to quit, but whether the plaintiff by his actions either has waived his right to demand rent and bring an action for its non-payment or has become estopped from claiming that rent is due.

If the tenant breaches a covenant in a lease the landlord has the option of declaring the lease at an end by his unequivocal act. *Macha* v. *Eastern Conn. Training School*, 24 Conn. Sup. 151 (App. Div. Cir. Ct. 1962).

One way in which he may exericse his privilege of terminating the lease is by serving upon the tenant a notice calling upon the tenant to quit possession. § 52-53 Conn. Gen. Stat. A written lease may waive this notice to quit, but then the landlord must still take some affirmative and unmistakable action to end the tenancy. § 52-533 Conn. Gen. Stat.; *Macha* v. *Eastern Conn. Training School, supra.*

The landlord is not required to terminate the lease on a breach of it by the tenant, for it is within his discretion to waive any deviance from its terms. *Sun Oil Co.* v. *Keane*, 2 Conn. Cir. 524 (App. Div. Cir. Ct. 1964). The tenant, on the other hand, must abide by the landlord's election. Thus, if the breach is waived, the lease will continue, and rent will be due under its terms. However, if the lease is terminated, then the landlord, by his actions, has agreed to release the tenant from his obligations in exchange for the termination of the lease relationship. *Feneck* v. *Nowakowski*, 146 Conn. 434 (1959); *Welk* v. *Bidwell*, 136 Conn. 603 (1950). In the first case the obligation to pay rent continues, but in the second it is suspended and in its place is substituted the obligation to pay reasonable and occupancy for the actual time that the premises were occupied. *Welk* v. *Bidwell*, supra; § 47-22 Conn. Gen. Stat.

The landlord, as has been stated before, is the one who is able to decide whether the lease is to be terminated, and the tenant's legal rights are profoundly affected by this decision. However, the landlord should not be able to place the tenant in the situation where the landlord can alternatively claim that the lease is terminated and that it is not terminated. The law does not look with favor upon the one who is at the same time both asserting and denying the existance of a legal relationship. This, however, is exactly what the plaintiff is claiming here. On May 8, 1967 the plaintiff elected to serve defendants with a notice to quit possession. The question here is not whether that notice to quit was valid or effective to terminate, but whether, plaintiff by serving that notice waived tenants' obligation to pay rent or is estopped from proceeding in non-payment.

The defendants being entitled to rely upon the plaintiff's action in serving the notice, did not pay the rent they thought was not due, and now the plaintiff is trying to hold that non-payment against them in the present action. The plaintiff here should be held to have waived the payment of rent subsequent to May 8, 1967, and it should be estopped from claiming in this action that there was rent due under the lease when in CV8-676-5856 it indicated its clear intention not to accept further rent. The tenant is entitled to reply upon the landlord's unequivocal action aimed at terminating the lease, and is not obligated to tender rent thereafter.

Plaintiff, by serving the notice to quit on May 8, 1967, intentionally and unequivocally expressed its intention not to receive rent from the tenant.

Landlords intention to refuse rent, whether expressed by words or deeds, relieves defendant from performing the futile act of producing rent. *Arsenault* v. *General Electric Co.*, 21 Conn. Sup. 98, 100 (1958), aff'd, 147 Conn. 130; *Buonocore* v. *De Feo*, 76 Conn. 705, 706 (1903); *Ashburn* v. *Poulter*, 35 Conn. 553, 556 (1869); *Sands* v. *Lyon*, 18 Conn. 18, 25 (1846).

Where landlord indicates it will not receive the rent, it may not later evict tenant for non-payment.

> The landlord's refusal to receive the rent excused the tenant from an actual production of the amount due and barred the landlord's right to claim a forfeiture on the basis of nonpayment of rent.

Mayron's Bake Shops, Inc. vs. *Arrow Stores, Inc.*, 149 Conn. 149, 156 (1961). See also *Webb* v. *Ambler*, 125 Conn. 548, 3552 (1939); *Barnum* v. *Keeler*, 33 Conn, 209 (1866).

The notice to quit served on May 8, 1967, waived tenants obligation to pay the rent which became due for May 1967. Defendants will prove that plaintiff has established a practice of accepting rent without objection within a period of two weeks after the first day of the month. By statute, reasonable time for late payment of rent in the case of an oral lease is a period of nine days. 47-23 Connecticut General Statutes.

Plaintiff served its notice to quit before the time had expired in which it had customarily accepted payment. By practice plaintiff had waived the obligation to pay rent on the first of the month.

> If the lessor, having for a long time accepted rent paid thus tardily, suddenly decided to insist upon the letter of the lease as to payment, it should, in fairness, have notified the lessee of such intention.

Seaboard Oil Co. v. *Williamson*, 1 Conn. Sup. 47, 56 (1935).

The time in which plaintiff customarily accepted payment of rent without objection had not expired when the May 8 notice to quit was served. Plaintiff expressed its unequivocal intention not to accept rent before the payment had become overdue, and, under the cases cited above, has waived its right to insist on the payment of May rent or any rent thereafter. *Sun Oil* v. *Keane*, 2 Conn. Cir. 524, 530 (1964); *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 92 Conn. 144, 149 (1917); *Seaboard Oil Co.* vs. *Williamson*, 1 Conn. Sup. 47, 56 (1935).

E. *There Was, and Is, No Rent Due and Owing to the Plaintiff From the Defendants for the Reason That the Plaintiff Has Not Obtained a Tenement House Certificate (Section 19-370 Conn. Gen. Stat.) for the Premises in Question, and Therefore This Action Based on Non-Payment of Rent Cannot Be Brought.*

The Tenement House Act, chapter 352 Conn. Gen. Stat., §§ 19-342 *et seq.*, sets forth certain minimum standards for health and safety. To show compliance with these standards a certificate of compliance, (§ 19-370 C.G.S.), is to be issued by a proper officer, (§ 19-373 C.G.S.). If a building meets the definition of a tenement house (§ 19-342 C.G.S.), and it does not have a certificate, then sections 19-370 and 19-371 C.G.S. make occupation of that building "unlawful". The owner is then subject to a penalty (§ 19-374 C.G.S.) and there is a further provision that:

> If any building constructed as, or altered into, a tenement house is occupied in whole or in part for human habitation in violation of the provisions of section 19-370, *during such unlawful occupation no rent shall be recoverable by the owner or lessee of such premises for such period and no action or special proceedings shall be maintained therefor.* Section 19-371 Conn. Gen. Stat. (emphasis added).

It should be noted that both "no rent shall be recoverable" *and* "no action or special proceeding shall be maintained therefor". The defendants contend that, first, this suit may not be brought because it is, in effect, an action or special proceeding for rent, and, secondly, that even if this suit may be brought, it cannot succeed, as there was never any rent lawfully due and owing the plaintiffs.

The first question, however, is whether the premises in question are subject to the provisions of the tenement house act. The premises will be subject to the act if they meet the definition of either section 19-342 Conn. Gen. Stat. or the definition of "garden apartment" under section 19-393 Conn. Gen. Stat., as garden apartments are subject to the provisions of the tenement house act by the provisions of section 19-394 Conn. Gen. Stat. It is the contention of the defendants that the premises, in fact, meet the definitional requirements of both sections.

The definition in section 19-342 Conn. Gen. Stat. provides that the following elements are necessary to make a tenement house:

1. A house or building
2. Which is rented, leased, or let out to be occupied

or

3. As the home or residence
4. Of three or more families
5. Living independantly of each other
6. And doing their cooking upon the premises
7. And having a common right in the halls, starways or yards.

The definition in section 19-393 Conn. Gen. Stat. established these requirements for a garden apartment project:

1. a multiple housing project
2. laid out on one plot
3. with walk-up apartments
4. in buildings not more than three stories in height.
5. containing separate living units
6. for three or more families
7. such units consisting of several apartments under the same roof
8. served by the same main means of ingress and egress
9. and contained within firewalls.

The defendants will submit evidence proving each element, and will prove that plaintiff has no tenement house certificate of occupancy, § 19-370, 19-375 Conn. Gen. Stat.

The plaintiff may not bring this action for eviction as it is prohibited by the statute. The words "no action or special proceedings" are broad enough to encompass an action in summary process for non-payment of rent. This does not, it should be emphasized, mean that the plaintiff cannot bring any summary process action, and therefore is never able to evict the tenant, but it merely means that he cannot use the grounds of nonpayment of rent as his basis in that suit.

The Appellate Division of this Court, as recently as March, 1967, approved an injunction of a summary process eviction for nonpayment where there was no tenement house certificate of occupancy. *Dreamy Hollow Apartments Corp.* v. *Lewis*, 4 Conn. Cir. 355, 232 A. 2d 346, 350 (1967).

Summary process evictions for non-payment differ from other evictions in several respects. Section 52-532 Conn. Gen. Stat. authorizes the use of a five day notice to quit possession rather than the usual ten day notice. Likewise, section 52-543 Conn. Gen. Stat. denies the tenant against whom judgment has gone for the reason of non-payment of rent the usual twenty day stay of execution, and section 52-546 Conn. Gen. Stat. prohibits

the court from granting that tenant a stay of execution for up to six months.

By prohibiting actions or special proceedings for non-payment of rent where there is no tenement house certificate, the statute deprives landlord of these special advantages. The purpose of the statute is to penalize the landlord into conforming his property. It would be against the public policy of this state for the courts to aid him in removing a tenant who is, in the last analysis, acting as the agent of the state in enforcing the law, in order to replace him with one who will pay him the rent that he has no right to and that he is, in fact, unlawfully collecting.

In any event, the effect of the law is to deny the landlord the right to collect rent on account of his own actions. *Loftus* v. *Second Nat. Bank of New Haven*, 121 Conn. 454 (1936); *Smith* v. *Dreamy Hollow Apts.*, 150 Conn. 702 (1963). The legislative intent was to deny the landlord the fruits of his illegal activity, and therefore it would be inconsistent with the principles of the law for it to be said that the landlord may not sue the tenant for rent but he may evict him for not paying that which is not legally due. The tenant's reward for the exercise of his legal right will be a swift and certain eviction from his home, and the landlord will immediately replace him with another who may well pay.

In either case, it is no defense for the plaintiff to claim that the building meets all the qualifications of the tenement house law. That argument was presented to the court, and rejected, in *Loftus* v. *Second Nat. Bk. of New Haven*, 121 Conn. 454 (1936). The court there stated that there sole question upon which the issue should be decided is the existance or non-existance of the certificate provided for by section 10-370.

The Connecticut statute was copied directly from the New York TENEMENT HOUSE LAW (now the MULTIPLE DWELLINGS LAW) and the cases there support this proposition. In one case the court held that rent was due if there were a certificate, even if it had been improperly obtained, and the building in fact did not comply with

the law. *Central Park Plaza Corp. v. Moisky*, 145 Misc. 688; 260 N.Y.S. 902 (Mun. Ct. City of N.Y. 1932).

The plaintiff may also claim that the Certificate of Occupancy issued by the West Haven Building Department is the equivilant of a tenement house certificate. This contention cannot be sustained. The clear requirement of section 19-370 Conn. Gen. Stat. is that the certificate state "that such building conforms in all respects with the requirements of this part." The West Haven certificate says nothing of the sort, is certainly not a form provided by the state labor commissioner § 19-875 C.G.S. and therefore it is for the purposes of this special defense, of no effect. *Loftus v. Second Nat. Bk. of New Haven*, 121 Conn. 454 (1936).

This Court is respectfully requested to take judicial notice of the official form of tenement house certificate issued in this State which does comply with the provisions of § 19-370 as it appears in Connecticut Supreme Court Records and Briefs, Vol. A-91 part 3, p. 181 (May term 1936), a copy of which is attached hereto. The Court may take such judicial notice under the authority of *Guerriero v. Galasso*, 144 Conn. 600 (1957) and *Gen. Hospital Soc. v. New Haven County*, 127 Conn. 53, 59 (1940) (judicial notice of printed documents issued by official).

The plaintiff, therefore, may not now sue the defendants for their eviction on the basis of non-payment of rent.

F. *The Plaintiff May Not Bring This Action As It Has Never Made Demand Upon the Defendants for the Rent Claimed to Be Due.*

At common law a demand for rent was the prerequisite for a forfeiture of an estate. In Connecticut, demand is prerequisite to the maintenance of a summary process for nonpayment. *Bowman v. Foot*, 29 Conn. 331, 341 (1860); *Sun Oil Co. v. Keane*, 2 Conn. Cir. 524, 528 (App. Div. Cir. Ct. 1964). The right to a demand for rent may be waived but this must be by clear terms in the lease, and such a waiver is strictly construed against the landlord. *Korner v. Dubin*, 104 Conn. 112 (1926);

Carry v. *Scott*, 47 Conn. 366, 375 (1879). There has been no waiver of demand in this case, nor does the plaintiff plead any such waiver.

Respectfully submitted

FRANCIS X. DINEEN
Attorney for the defendants,
Appearing Specially

DEPARTMENT OF BUILDINGS
Room No. 9, City Hall
TENEMENT HOUSE CERTIFICATE

New Haven, Conn. .....

THIS IS TO CERTIFY that the building located at

.....

owned by .....
for which permit No. was issued on 19
conforms in all respects to the TENEMENT HOUSE ACT and may from this date be occupied for human habitation.

.....
Building Inspector

Inspected by .....

No. 496

* * * *

EXHIBIT 3 TO MOTION TO REVIEW

[Memorandum of Decision Omitted.
Printed side page ~~53~~ 5 ante]

EXHIBIT 4 TO MOTION TO REVIEW

[Motion to Waive Surety Bond on Appeal Omitted.
Printed side page ~~61~~ 10 ante]

EXHIBIT 5 TO MOTION TO REVIEW

[Memorandum of Decision on Motion to Waive
Surety Bond on Appeal Omitted.
Printed side page ~~68~~ 23 ante]

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV-8-677-5985

[Title Omitted]

MOTION TO DISMISS APPEAL—January 23, 1968

In compliance with Sections 1023 and 697 of the Connecticut Practice Book (1963), the plaintiff herein respectfully moves that the defendants' appeal be dismissed for non-compliance with the mandatory surety requirement of Section 52-542 of the Connecticut General Statutes.

The Plaintiff,
West Haven Housing Authority

By: PHILBIN, DONAHUE & VOTTO

/s/ E. Michael Heffernan
E. MICHAEL HEFFERNAN
Its Attorney

[Order Omitted in printing]

[Certification Omitted in printing]

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. ET UX

ORDER—February 29, 1968

In connection with this case an application was made to the United States District Court claiming injunctive relief against certain court officials and against the plaintiff. As a result of such application to the United States Court a conference was held in the chambers of Judge Robert Zampano, United States District Judge, at which conference the interested parties and/or their attorneys were present. It was the opinion of the United States District Judge, as set forth in this file, that the problems presented by the application for an injunction should be litigated to a conclusion in the State Courts and that in lieu of a compliance with the statute that requires a surety bond when an appeal is taken in certain aspects of our summary process law, the United States Court ordered that the defendant pay the sum of seventy-two dollars into the registry of the United States Court and that said sum and such other sums as are paid into the United States District Court in connection with this particular proceeding are to be transmitted to the Clerk of the Circuit Court of the State of Connecticut in the Eighth Circuit for deposit by him pending the ultimate disposition of this case in the State Courts.

Pursuant to the order of the United States District Court I hereby direct that Mr. Serafino Ginnetti, Clerk of the Eighth Circuit, upon receiving the sum of seventy-two dollars and upon receiving any further sums in connection with the order of the United States Court, that he deposit said amounts, clearly earmarked, in the bond account of the Eighth Circuit and hold said sums in said account until further order of this Court.

/s/ DiCenzo
J.

IN THE APPELLATE DIVISION OF THE CIRCUIT COURT, CONNECTICUT

Date of Judgment March 1, 1968

Decision Announced March 7, 1968

File No. CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

v.

RECTOR SIMMONS, JR. ET AL.

Argued February 19, 1968 Decided March 1, 1968

Motion by the defendants for review of the action of the trial court, *DiCenzo, J.*, in denying their application for a waiver of security in an appeal from a judgment in a summary process action in the Circuit Court in the eighth circuit. *Motion denied; appeal dismissed.*

Francis X. Dineen, of New Haven, for the appellants (defendants).

Dennis J. Donahue, Jr. and *E. Michael Heffernan*, of West Haven, for the appellee (plaintiff).

OPINION

JACOBS, J. The complaint in this summary process action alleged these facts: The defendants entered into possession of the leased premises on the first day of November, 1966, under a written lease, for the term of one month, renewable for successive terms of one month each, at a monthly rental of $72, payable in advance, on the first day of each month. On July 12, 1967, the plaintiff gave the defendants the statutory notice that they were to quit possession of the premises on or before July 18, 1967, for failure to pay the rent due for the months of May, June and July, 1967.

After the filing of the summary process action, a succession of pleadings followed; and, on December 4, 1967,

the court (*DiCenzo, J.*) ordered the pleadings closed within one week from the aforesaid date. The defendant complied with the order of court. A hearing was held on the merits on January 16, 1968. Judgment was rendered for the plaintiff to recover possession of the premises described in the complaint upon the ground of nonpayment of the rent.

Upon the taking of an appeal, the defendants filed an application in the trial court for waiver of surety on appeal upon the ground of defendants' indigency and attached an affidavit to the motion showing the defendants' financial condition.

On January 19, 1968, the trial court held a special hearing on the defendants' application for waiver of security on appeal. The court found that no rent had been paid since May 1, 1967, nor had the defendants offered to pay any part of the rent due; that the record contained "dilatory tactics, and [was] loaded with defenses interposed to delay and obstruct the summary process action"; and that the "appeal is being taken for the purpose of delay." Accordingly, the court denied the application for waiver of security on appeal.

"With the establishment of the circuit court in 1959, the statute providing for the review of judgments of summary process by writ of error was repealed. Gen. Stat., 1959 Sup., § 52-274. Jurisdiction of summary process is now vested in the circuit court; Gen. Stat., 1959 Sup., . . . § 52-2a; it is reviewable as in any other of its judgments." Maltbie, Conn. App. Proc. (1961 Sup.) § 241; see Rubinow, "Circuit Court Civil Jurisdiction and Procedure" in Stephenson, Conn. Civil Proc. (1966 Sup.) § 191e. "The right to an appeal is not a constitutional one, nor one based upon principles of natural justice. It is but a statutory privilege which an aggrieved party has the right to avail himself of only when he has strictly complied with the provisions of the statutes and rules upon which the privilege is granted." *Bronson* v. *Mechanics Bank*, 83 Conn. 128, 133; see *Bennett* v. *United Lumber and Supply Co.*, 110 Conn. 536, 538. "An appeal in this state is a statutory privilege accorded only if the conditions fixed by the statutes and rules of court for taking and prosecuting

it are complied with." *Kennedy* v. *Walker*, 135 Conn. 262, 266. "Under its general authority to regulate appellate procedure the legislature has the power to require the giving of a bond or undertaking as a condition precedent to the right to appeal or sue or a writ of error, unless such power is clearly excluded by the constitution. Such statutes do not violate constitutional provisions granting the right of appeal, as they do not restrict or deny the right, but merely regulate the manner of exercising it, . . ." 4A C.J.S., Appeal and Error, § 502(b), p. 208. "The statutes [relating to summary process actions] almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession." 2 Tiffany, Landlord and Tenant (1912 Ed.) § 284, p. 1805; see 52 C.J.S., Landlord and Tenant, § 784(a); *Pollack* v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173, 174. Thus, it is left to the legislature to provide the manner of taking an appeal and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party.

Section 52-542 of the General Statutes, as amended by Public Act 509, § 4 (1961), provides that "[w]hen any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue . . . ." A sufficient bond with surety is essential to a valid appeal; see *Palmer* v. *Des Reis*, 136 Conn. 627, 630; and "is solely for the protection of the appellee." *Palmer* v. *Des Reis*, 135 Conn. 388, 389.

The defendants insist that the statutory requirement of a bond with surety as a condition procedent to the appeal as applied to them unconstitutionally discriminates against them as indigent defendants in violation of the Equal Protection Clause of the United States Constitution and Article I, § 10 of the Constitution of Connecticut (1965).

It would certainly require strong authority to induce us to come to the result as is claimed by the defendants.

The defendants rely upon a dissenting opinion by Mr. Justice Douglas, with whom the Chief Justice concurred, from the denial of the grant of certiorari, in *Williams* v. *Shaffer*, 385 U.S. 1037, 87 Sup. Ct. 772, 17 L.Ed. 683. In that case, the petitioners were unable due to indigency to furnish the security bond required by Ga. Code Ann. (1966) § 61-304. The Supreme Court of Georgia held that the question involved was moot; the appeal was dismissed because the petitioners had been evicted. *Williams* v. *Shaffer*, 222 Ga. 334, 149 S.E. 2d 668. Mr. Justice Douglas characterized Georgia's summary eviction statutes; Ga. Code Ann. (1966) §§ 61-301 through 61-305; as providing (p. 1037) "a very swift, expedient manner" by which a landlord may oust a tenant. But Georgia's summary process statutes differ radically from ours. Under Ga. Code Ann. (1966) § 61-301, the landlord files with a judge of the superior court or justice of the peace an affidavit that the tenant has held over or has failed to pay the rent; the judge thereupon issues a dispossessory warrant ordering the sheriff to evict the tenant and his possessions. Ga. Code Ann. (1966) § 61-302; see *Huff* v. *Markham*, 70 Ga. 284, 288; *Hicks* v. *Beacham*, 131 Ga. 89, 92, 62 S.E. 45, *Carter* v. *Sutton*, 147 Ga. 496, 94 S.E. 760; *Shehand* v. *Eberhart*, 30 Ga. App. 265, 266, 117 S.E. 675. The tenant may arrest the proceedings and prevent his summary eviction by filing a counteraffidavit denying the landlord's allegations (Ga. Code Ann. (1966) § 61-303) and thereby obtain a jury trial on the facts in issue. Ga. Code Ann. (1966) § 61-304. "The bond and security must be given before the tenant can resist the warrant by counter-affidavit." *Realty Management, Inc.* v. *Keith*, 114 Ga. App. 317, 151 S.E. 2d 189. And where the issues specified in § 61-304 are decided adversely to the tenant, he is liable for double the rent reserved or stipulated. Ga. Code Ann. (1966) § 61-305; see *Stanley* v. *Stembridge*, 140 Ga. 750, 754, 79 S.E. 842; *Sims* v. *Shotkin*, 70 Ga. App. 68, 71, 27 S.E. 2d 466; *Gaultner* v. *Adamson*, 75 Ga. App. 406, 408, 43 S.E. 2d 778. It may well be true that in Georgia an indigent tenant may be deprived of his shelter, and the life of his family disrupted—all without a hearing—solely because of his poverty. Surely it cannot be said that these defendants were denied a full

and plenary hearing on the merits. And when we take a look at the record this case, we would be hard put to say that the defendants lacked the economic power to make themselves heard in a court of law, indeed, seldom in our experience with summary process actions had tenants received such zealous and vigorous advocacy of their rights as reflected by the record and briefs which comprise some 140 typewritten pages. "This Court of course does not sit to cure social ills that beset the country." *Williams* v. *Shaffer*, 385 U.S. 1037, 1041, 87 Sup. Ct. 772, 17 L.Ed. 2d 683.

Roberts v. *LaVallee*, 389 U.S. 40, 88 Sup. 194, 19 L.Ed. 2d 41, also cited by the defendants, is distinguishable on the facts. The petitioner was indigent. He was charged with multiple offenses: robbery, larceny and assault. At trial he asked the court to furnish him, at state expense, with minutes of a prior preliminary hearing, at which the major state witnesses had testified. His request was denied. The petitioner was convicted of the crimes charged and sentenced to a term of 15-20 years in prison. It was in that context that the court said (p. 42): "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

The defendants here had an obvious choice; they could have relinquished possession or, if they wanted to take an appeal, to give sufficient bond with surety. See *Horn* v. *Blackwell*, 212 S.C. 480, 484, 48 S.E. 2d 322; *Stoler* v. *Fraternal Order of Beavers*, 171 Pa. Super. 170, 172, 190 A.2d 304, *Hier* v. *Anheuser-Busch Brewing Assn.*, 52 Neb. 144, 145, 71 N.W. 1005.

We fail to see that the statute under attack (§ 52-542) violates constitutional precepts.

Want of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal.

The motion for review is denied; the appeal is dismissed.

In this opinion KOSICKI and DEARINGTON, Js., concurred.

The foregoing is a true copy of the final opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to change by the Judges only in matters of form and then only with the approval of the Reporter of Judicial Decisions.

/s/ Elliott R. Katz
ELLIOTT R. KATZ,
Chief Clerk

IN THE APPELLATE DIVISION
OF THE CIRCUIT COURT
STATE OF CONNECTICUT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

On Appeal From Circuit Court, Eighth Circuit

JUDGMENT—February 19, 1968

This appeal by the defendants from the judgment of said Circuit Court, Eighth Circuit was taken on the 18th day of January, 1968 accompanied by a Motion to Waive Surety Bond, required by Section 52-542 of the General Statutes when an appeal is taken by the defendant in a summary process action, from a judgment for possession of the premises is rendered for the plaintiff. The Motion to Waive Surety Bond was dismissed by the Court (DiCenzo, J.) on January 19, 1968 and on the 24th day of January, 1968, the appellants filed their Motion to Review and Vacate the Action of the Court in denying the defendant's Motion to Waive Surety Bond on Appeal and in finding that the defendants appeal is taken for the purpose of delay. On the 25th day of January, 1968, the appellee filed a Motion to Dismiss the Appeal for failure to file such surety bond as may appear in the record on file in said court. Said Motion to Review and said Motion to Dismiss Appeal came to the session of the Appellate Division on February 19, 1968 when the parties appeared.

This Court, having heard the parties, finds that want of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal.

It is therefore considered and adjudged that the Motion to Review is denied and that the Motion to Dismiss the Appeal is granted; the appeal is dismissed.

Judgment entered March 1, 1968.

By the Court,

/s/ Serafino Ginnetti
SERAFINO GINNETTI, Clerk

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONN.

CV-8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. & ROSE SIMMONS

MOTION TO TERMINATE STAY OF EXECUTION—
March 15, 1968

The Plaintiff, West Haven Housing Authority, respectfully moves, pursuant to Section #744 of the Practice Book (1963) that the presiding judge of the Appellate Panel, (Kosicki, J.) terminate the defendants' Stay of Execution, provide for in said section, in the above-entitled matter, in that the certification proceedings taken by the defendants are only for delay, and/or the due administration of justice requires that said Stay of Execution be terminated.

THE PLAINTIFF,

WEST HAVEN HOUSING AUTHORITY

BY: PHILBIN, DONAHUE & VOTTO

/s/ Dennis J. Donahue, Jr.
DENNIS J. DONAHUE, JR.
Its Attorney

• • • •

IN THE
SUPREME COURT OF CONNECTICUT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

PETITION FOR CERTIFICATION BY SUPREME COURT

* * * *

QUESTIONS PRESENTED

1. Whether the provision of section 52-542 of the Connecticut General Statutes requiring defendants to provide a surety bond on appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America, as well as the provision of Article I Section 10, of the Constitution of the State of Connecticut.

2. Whether a motion for Review lies to review the decision of the trial judge in which a finding is made that the appeal is taken for the purpose of delay.

3. Whether a motion for Review effects a Stay of Execution pending a decision thereon.

4. Whether the provision of § 52-542 of the Connecticut General Statutes permitting the trial judge to find that the appeal is taken for the purpose of delay thereby precluding a stay of execution pending appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States in that the statute makes no provision for notice and hearing prior to the making of such a finding, in that the statute sets up an arbitrary and unreasonable standard to be applied by the trial judge and in that the effect of the statute is to permit the trial judge to prevent an effective appellate review of his own rulings and decision at the trial.

5. Whether the action of the trial judge in finding that the appeal in this case was taken for the purpose of delay was arbitrary, unreasonable and without basis in the record, in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America.

IN THE APPELLATE DIVISION
CIRCUIT COURT, EIGHTH CIRCUIT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

SUPPLEMENTARY JUDGMENT—May 16, 1968

On March 11, 1968, the defendant filed a Petition for Certification from the judgment of the Appellate Division denying the defendant's Motion for Review and dismissing the defendant's appeal from the judgment entered by the Circuit Court, Eighth Circuit.

On March 15, 1968, the plaintiff filed a Motion for an Order Terminating the Stay of Execution pending the appeal to the Supreme Court and at a special session of the Appellate Division of the Circuit Court held on April 1, 1968 a hearing was held before the presiding judge, Kosicki, P.J., the hearing being limited to the plaintiff's Motion for Termination of the Stay of Execution. Jacobs, J. and Dearington, J. were also present. The presiding judge and the court having heard the parties, granted the plaintiff's Motion for an Order Terminating a Stay of Execution.

It is therefore considered and adjudged that the Plaintiff's Motion for an Order Terminating a Stay of Execution must be and the same is hereby granted; this order shall not become effective until five days after receipt of this order.

Judgment entered April 11, 1968.

Decision announced April 18, 1968.

By the Court,

/s/ Serafino Ginnetti
SERAFINO GINNETTI, Clerk

IN THE APPELLATE DIVISION OF THE CIRCUIT COURT, CONNECTICUT

Date of Judgment April 11, 1968

Decision Announced April 18, 1968

File No. CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

v.

RECTOR SIMMONS JR. ET AL.

Argued April 1, 1968 Decided April 11, 1968

Motion by the plaintiff for an order terminating a stay of execution on appeal from a judgment in a summary process action in the Circuit Court in the eighth circuit. *Motion granted.*

Francis X. Dineen, of New Haven, for the appellants (defendants).

E. Michael Heffernan, of West Haven, for the appellee (plaintiffs).

ORDER. This is a motion made pursuant to the provisions of Practice Book § 744 to terminate a stay of execution on appeal from a judgment in a summary process action upon the ground that the certificaton proceedings (Practice Book § 743) were taken by the defendants only for delay and that the due administration of justice requires such termination.

At a special session of the Appellate Division held on April 1, 1968, (Kosicki, P.J.), the hearing was limited to plaintiff's motion for termination of stay of execution.

At the outset, we make this observation. "It has always been the policy of our law to limit the issues in an action of summary process to a few simple ones within the express scope of the statutory provisions." *Webb* v. *Ambler*, 125 Conn. 543, 550. "The action of summary process is a special, statutory remedy to enable landlords to obtain possession of leased premises without suffering

the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. 1 Swift's Dig., s.p. 511. 'The proceeding was not only intended to be summary, but conclusive.'" *Marsh* v. *Burnhans*, 79 Conn. 306, 308; see *Atlantic Refining Co.* v. *O'Keefe*, 131 Conn. 528, 530; *Proch* v. *Decho*, 134 Conn. 649, 651; Greenberg, The Action of Summary Process, 33 Conn. B.J. 62, 69.

We briefly review the proceedings in the court below. The summary process action was made returnable before the Circuit Court in the eighth circuit on the fourth Tuesday of July, 1967. After the filing of the action, the defendants pleaded in abatement to which the plaintiff filed a demurrer. The court (*Kinmonth, J.*) sustained the demurrer. On August 21, 1967, the defendants filed two motions: one for more specific statement (Practice Book § 99), and the other for over (Practice Book § 103). These motions were granted by the court (*Macdonald, J.*). The plaintiff complied with the order of the court. On August 24, 1967, the plaintiff filed a motion for judgment by default for failure to plead which was followed by defendants' objections to the motion. The court (*Wise, J.*) sustained defendants' objections "by agreement of counsel." Thereafter, the defendants filed a second demurrer on the ground that the complaint, which alleged a written lease, failed to allege a valid termination of the lease. The court (*Adorno, J.*) overruled the demurrer. Additional motions were presented to the court (*Sullivan, J.*); finally, on December 7, 1967, the court (*DiCenzo, J.*) ordered the defendants to file an answer. The answer contained some admissions and denials and alleged seven special defenses. The case was fully tried on the merits on January 9, 1968. On January 16, 1968, the court (*DiCenzo, J.*) rendered judgment for the plaintiff upon the ground of nonpayment of the rent.

The defendants appealed from the judgment. In connection with the appeal, they filed an application in the trial court for waiver of surety on appeal upon the ground of indigency.

On January 19, 1968, the trial court held a special hearing on defendants' application for waiver of security

on appeal. In its memorandum of decision, the court made these findings: "(1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due; (2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding; (3) the instant motion is another effort to avoid the clear obligation required by § 52-542 . . . of the General Statutes, requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents which may accrue; and (4) it clearly appears to this court [*DiCenzo, J.*], having tried this case, that this appeal is being taken for the purpose of delay." Accordingly, the court denied the application for waiver of surety on appeal as required by the statute. Thereafter, the defendants filed in this court a motion for review of the action of the trial court in the denial of the application.

On March 1, 1968, in *West Haven Housing Authority* v. *Simmons*, Conn. Cir. Ct. , 8 App. Div. No. 14, we held that the statute under attack, § 52-542, was not violative of constitutional precepts; and we further held that "[w]ant of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal." Id., p. 6. We denied the motion for review and dismissed the appeal.

Appeals for delay and frivolous appeals have given trouble from the beginning." Pound, "Appellate Procedure in Civil Cases" (1941 Ed.) 31. "The authorities are numerous that where a writ of error is brought for the purpose of delay it does not superseded the execution": *Brewster* v. *Cowen*, 55 Conn. 152, 156; so in the statute (§ 52-542), with regard to summary process for obtaining possession of leased premises, it is provided that the defendant may have five days after judgment in which to take an appeal, and that "execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay." "A supersedeas or stay will not issue unless it is necessary to presere the rights of the parties pending determination of the appeal; nor will it be granted where it appears that the appeal . . . is

merely for the purpose of delay; . . . . Further, a supersedeas or stay will not be granted . . . where the supersedeas or stay may defeat the ends of justice or result in irreparable or disproportionate injury to the appellee; . . . where the damages which may result from the supersedeas or stay is of such a character that it cannot be compensated in money, so that the appellee will not be protected by the bond in case of affirmance; . . . where appellant has not executed the bond or undertaking required by law or a sufficient bond or undertaking . . . ." 4A C.J.S., Appeal & Error, § 636, p. 454; see 5 Am. Jur. 2d, Appeal and Error, § 912; *People* v. *Jackson*, 190 Cal. 257, 261, 212 Pac. 4; *Application of Mott*, 123 N.Y. Sup. 2d 603; *Sartin* v. *Barlow*, 196 Miss. 159, 168, 16 So. 2d 372.

In the interpretation of Practice Book § 744, the controlling consideration is that it provides for a termination of stay "if the presiding judge of the appellate panel which heard the case is of the opinion that the certification proceedings have been taken only for delay or that the due administration of justice requires him to do so, he may, up to the time . . . [the Supreme Court] acts upon the petition, upon motion and hearing, order that the stay be terminated." See *Northeastern Gas Transmission Co.* v. *Benedict*, 139 Conn. 36, 39; *Muti* v. *Collins*, 24 Conn. Sup. 455, 456.

We have before us the entire file in the case. As we noted in *West Haven Housing Authority* v. *Simmons*, supra, the record and briefs in this case comprise some 140 typewritten pages. Upon a review of the whole matter, we are satisfied that Judge DiCenzo was justified in concluding "that this appeal is being taken for the purpose of delay."

Therefore, the plaintiff's motion for an order terminating a stay of execution must be and the same is hereby granted; this order shall not become effective until five days after receipt of this order.

KOSICKI, Presiding Judge.

In this opinion KOSICKI, DEARINGTON and JACOBS, Js., concurred.

The foregoing is a true copy of the final opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to change by the Judges only in matters of form and then only with the approval of the Reporter of Judicial Decisions.

/s/ Elliott R. Katz
ELLIOTT R. KATZ,
Chief Clerk

IN THE SUPREME COURT

CV8—677—5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

ORDER DENYING CERTIFICATION—June 25, 1968

The defendants having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it hereby is denied.

BY THE COURT

/s/ DOMINIC A. DICORLETO,
Clerk

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV8-677-5985 AP

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—June 27, 1968

I. Notice is hereby given that Rector Simmons, Jr., and Rose Simmons, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of this Court denying their motion to review and dismissing their appeal, entered on March 1, 1968, certification of the Supreme Court of Connecticut having been denied on June 25, 1968.

This appeal is taken pursuant to Title 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript all papers and materials now in the possession of the clerk, and transcripts of the trial and of all subsequent proceedings as taken by the court reporter.

III. The following questions are presented by this appeal:

(a) Whether the provision of section 52-542 of the Connecticut General Statutes requiring defendants to provide a surety bond on appeal is unconstitutional in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States of America, in that it effects an invidious discrimination on the basis of wealth of those financially unable to post a surety bond.

(b) Whether the provision of section 52-542 of the Connecticut General Statutes permitting the trial judge to find that an appeal is taken for the purpose of delay thereby precluding a stay of execution pending appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the

Constitution of the United States of America in that the statute makes no provision for notice and hearing prior to the making of such a finding, in that the statute sets up an arbitrary and unreasonable standard to be applied by the trial judge and in that the effect of the statute is to permit the trial judge to prevent an effective appellate review of his own rulings and decision at trial.

(c) Whether the action of the trial judge in finding that the appeal in this case was taken for the purpose of delay was arbitrary, unreasonable, capricious and without basis in the record, in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America.

/s/ Francis X. Dineen
FRANCIS X. DINEEN
JOSEPH M. SHORTALL
Attorneys for the
Appellants (Defendants)
169 Church Street
New Haven, Connecticut
Telephone 203-562-0151
ext. 233

[Proof of Service Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 909 Misc., October Term, 1968

RECTOR SIMMONS, JR., ET UX., APPELLANTS

v.

WEST HAVEN HOUSING AUTHORITY

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 7, 1969

'74.

SUPREME COURT OF THE UNITED STATES

No. 909 Misc., October Term, 1968

RECTOR SIMMONS, JR., ET UX., APPELLANTS

v.

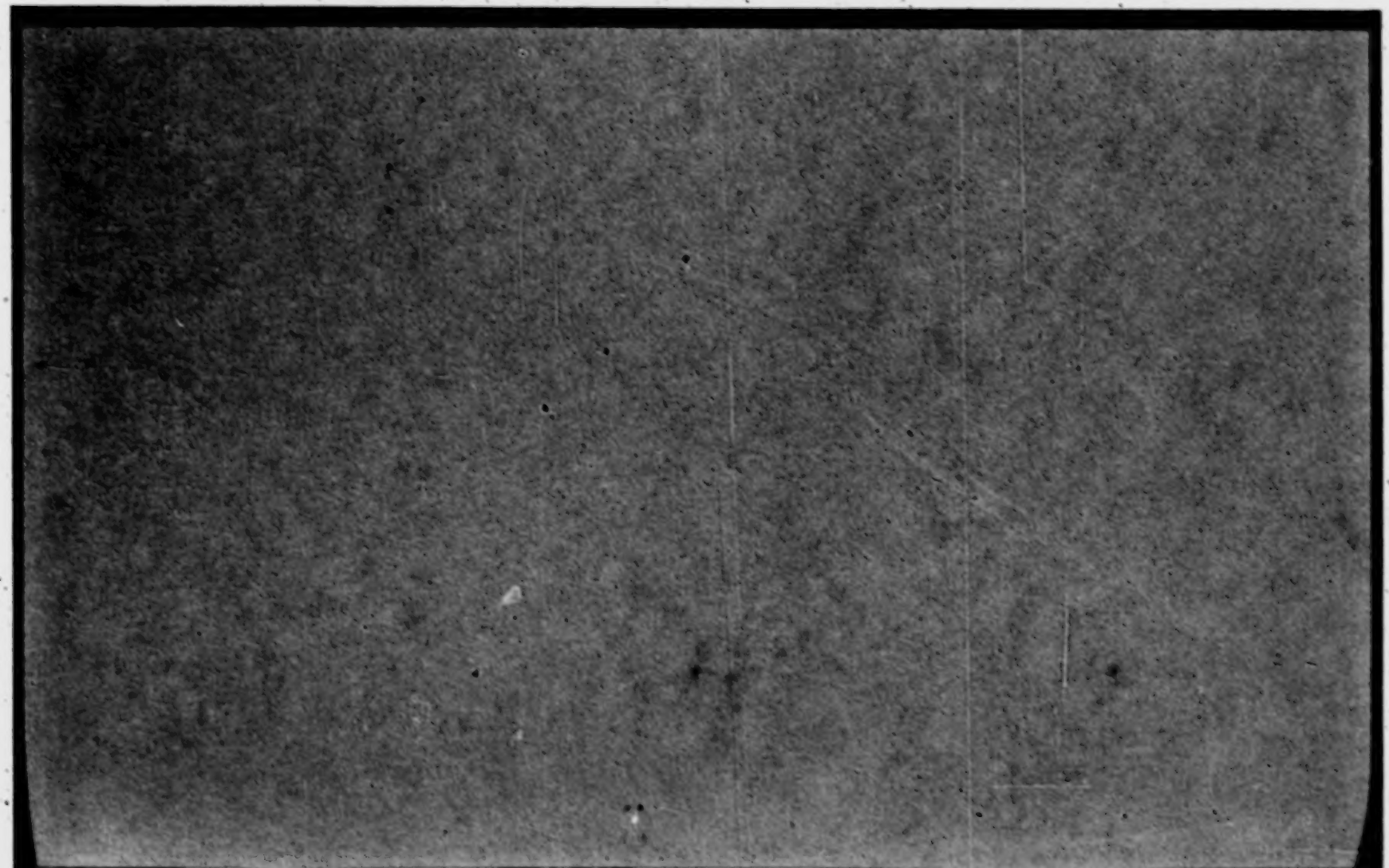
WEST HAVEN HOUSING AUTHORITY

APPEAL from the Appellate Division of the Circuit Court of the State of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1232 and placed on the summary calendar.

April 7, 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 356-404 11



LIBRARY
SUPREME COURT, U. S.

2
Office-Supreme Court, U.S.
FILED
AUG 4 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., *et ux.*,

Appellants,

vs.

WEST HAVEN HOUSING AUTHORITY,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

APPELLANTS' BRIEF

JOSEPH M. SHORTALL
JOANNE S. FAULKNER
FRANCIS X. DINEEN
New Haven Legal Assistance Association, Inc.
169 Church Street
New Haven, Connecticut 06510
Attorneys for Appellants

INDEX

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction of This Court	2
Provisions of the United States Constitution	3
Statute Involved	4
Question Presented	6
Statement of the Case	6
Summary of Argument	10
ARGUMENT:	
I. The Requirement of a Bond With Surety as a Condition Precedent to Appeal From a Judgment of Eviction Is a Serious Financial Obstacle to Access to Appellate Courts for Most Tenants. It Effectively Precludes Indigent Tenants From Appealing Their Eviction	17
II. Appellate Courts Must Not Be Closed to the Poor	21
III. Denying Tenants Access to Connecticut's Appellate Courts Because They Are Financially Unable to Give a Bond With Surety to Their Landlord Deprives Them of Liberty and Property Without Due Process of Law and Denies Them the Equal Protection of the Laws	27
A. The Tenants' Interests in Possession of the Premises Are Protected by the Fourteenth Amendment	28
B. The Requisite State Action Is Present	30

Page

C. The State's Prescription of a Surety Bond as a Condition Precedent to the Tenants' Appeal Effects an Invidious Discrimination Among Tenants on the Basis of Wealth, and, Therefore, the Dismissal of the Appeal Because of Their Financial Inability to Provide Such a Bond Denied Them the Equal Protection of the Laws 31

1. The Equal Protection Clause Regulates Financial Discrimination Which Limits Access to Appellate Courts in Civil Cases 31

2. The Financial Discrimination Effected by Conn. Gen. Stat. §52-542 Does Not Promote a Compelling State Interest, Nor Is It Rationally Related to the Attainment of a Legitimate State Objective 37

a. The Statute's Classification Is Based on a Suspect Criterion, Adversely Affects a Fundamental Citizen Interest, Yet Is Not Necessary to Promote a Compelling Governmental Interest 37

b. The Statute's Classification Is Not Rationally Related to a Legitimate State Objective 41

D. The State's Prescription of a Surety Bond as a Condition Precedent to the Tenants' Appeal Is Not Reasonably Related to a Legitimate State Objective, and, Therefore, the Dismissal of the Appeal Because of Their Financial Inability to Provide Such a Bond Deprived Them of Liberty and Property Without Due Process of Law 44

Page

E. The Dismissal of the Tenants' Appeal Because of Their Financial Inability to Post a Surety Bond Violated Their Right to Petition the Government for Redress of Grievances 46

1. The Constitution Establishes a Right to Litigate, to Petition the Courts for a Redress of Grievances 46

2. The Surety Bond Statute Is an Overly Broad Restriction on the Right to Litigate 50

F. The Empowering of a Private Party, the Surety Required by §52-542, to Grant or Withhold Access to the Appellate Courts Violates the Due Process Clause 51

G. The Surety Bond Statute Is Unconstitutionally Vague as to the Amount of the Bond Required, Thus Empowering the Trial Judge to Arbitrarily Prevent Review of His Own Decisions 54

H. The Surety Bond Statute, Insofar as It Requires a Bond Sufficient to Cover Rents Claimed to Have Accrued While the Action Was Pending in the Trial Court, Violates Both the Due Process and Equal Protection Clauses of the Fourteenth Amendment 56

Conclusion 60

Table of Authorities

Page

CASES:

Allgeyer v. *Louisiana*, 165 U.S. 578 30
Anders v. *California*, 386 U.S. 738 ..... 15, 53, 56

Barber v. *Gladden*, 298 P. 2d 986 (Ore. 1956) 36
Barbier v. *Connolly*, 113 U.S. 27 33
Bates v. *Little Rock*, 361 U.S. 516 ..... 15, 51
Bernd v. *Lynes*, 71 Conn. 733, 43 Atl. 189 (1899) 18
Bolling v. *Sharpe*, 347 U.S. 497 30
Brown v. *Allen*, 344 U.S. 443 55
Burns v. *Ohio*, 360 U.S. 252 19
Bynum v. *Comm'n on Forfeited Rights*, 410 F. 2d 173 (2d Cir. 1969) 36

Carrington v. *Rash*, 380 U.S. 89 ..... 13, 41, 43, 58
Carroll v. *Cooney*, 116 Conn. 112, 163 Atl. 599 (1933) 29
Cianciolo v. *Plano*, 1 Conn. Cir. 206, 181 A. 2d 611 (1962) 57
Clinch Valley Lumber Corp. v. *Hagan Estates, Inc.*, 167 Va. 1, 187 S.E. 440 (1936) 18
Cole v. *Arkansas*, 333 U.S. 196 49
Coppedge v. *U. S.*, 369 U.S. 438 ..... 50, 56

DeJonge v. *Oregon*, 299 U.S. 353 48
Douglas v. *California*, 372 U.S. 353 13
Draper v. *Washington*, 372 U.S. 487 56

Edwards v. *Habib*, 366 F. 2d 628 (D.C. Cir. 1965) 23
Edwards v. *Habib*, 397 F. 2d 687 (D.C. Cir. 1968) 23
Eskridge v. *Washington State Board*, 357 U.S. 214 ..... 53, 56

Feneck v. *Nowakowski*, 146 Conn. 434, 151 A. 2d 891 (1959) 56-57
Frank v. *Mangum*, 237 U.S. 309 ..... 33, 44, 49

Page

Giaccio v. *Pennsylvania*, 382 U.S. 399 55
Gibbes v. *Zimmerman*, 290 U.S. 326 52
Griffin v. *Illinois*, 351 U.S. 12 ....11, 12, 14, 21, 26, 28, 31, 33, 36, 39, 45, 46, 49, 52

Harper v. *Virginia Bd. of Elections*, 383 U.S. 663 .....13, 35, 36, 37
Hernandez v. *Texas*, 347 U.S. 475 38
Herndon v. *Lowry*, 301 U.S. 242 55
Housing Authority v. *Alprovis*, 19 Conn. Sup. 37, 109 A. 2d 884 (1954) 57
Housing Authority v. *Jones*, 5 Conn. Cir. 350, 252 A. 2d 465 (1968) 19, 30, 54
Housing Authority v. *Simmons*, 5 Conn. Cir. 282, 250 A. 2d 527 (1968) 1

In re Gault, 387 U.S. 1 1

Jeffreys v. *Jeffreys*, 57 Misc. 2d 416, 296 N.Y.S. 2d 74 (1968) 36
Johnson v. *United States*, 352 U.S. 565 56
Jo-Mark Sand & Gravel Co. v. *Pantanella*, 139 Conn. 598, 96 A. 2d 217 (1953) 29
Jones v. *Union Guano Co.*, 264 U.S. 171 45

Kingsley Int'l Pictures Corp. v. *Regents*, 360 U.S. 684 55

Lane v. *Brown*, 372 U.S. 477 ..... 15, 53
Long v. *District Court of Iowa*, 385 U.S. 192 .... 13, 34

McLaughlin v. *Florida*, 379 U.S. 184 .....13, 38, 41
Montlick v. *Bridges*, CV6-40074 (Sixth Cir., Conn. 1969) 19

NAACP v. *Alabama*, 357 U.S. 449 49
NAACP v. *Button*, 371 U.S. 415 .....15, 23, 47, 48, 49, 51, 55
Nat'l Union of Marine Cooks and Stewards v. *Arnold*, 348 U.S. 37 59
New York Times Co. v. *Sullivan*, 376 U.S. 254 ... 46

Page

Pollard v. Pollard, 1 Conn. Cir. 143, 177 A. 2d 471 (1961) 57

Railroad Trainmen v. Virginia Bar, 377 U.S. 1 ..... 15, 47, 48, 49

Rapid Transit Corp. v. City of New York, 303 U.S. 573 37

Rauleigh Co. v. Warrington, 199 Atl. 666 (Del. 1938) 18

Rinaldi v. Yeager, 384 U.S. 305 ..... 14, 42

Roberts v. LaVallee, 389 U.S. 40 36

Robertson v. Greene, No. 336-565 (Ore. 1967) 36

Royster Guano Co. v. Virginia, 253 U.S. 412 42

Sanks v. Georgia, No. 266, O.T. 1969 36

Shapiro v. Thompson, —— U.S. ——, 37 U.S. L.W. 4333 ..... 13, 28, 33, 37, 39, 40, 41, 43, 58

Shelley v. Kraemer, 334 U.S. 1 ..... 29, 30

Shelton v. Tucker, 364 U.S. 479 ..... 15, 51

Smith v. Bennett, 365 U.S. 708 ..... 13, 33, 34

Sniadach v. Family Finance Corp., —— U.S. ——, 37 U.S.L.W. 4520 ..... 16, 46, 50, 58

State v. Cullum, 149 Conn. 728, 176 A.2d 587 (1961) 3

Thomas v. Collins, 323 U.S. 516 50

United Mine Workers v. Illinois Bar, 389 U.S. 217 ..... 15, 48, 49

United States v. Robel, 389 U.S. 258 ..... 46, 49, 51

Walker v. Sauvinet, 92 U.S. 90 ..... 17, 44

Williams v. Oklahoma City, —— U.S. ——, 37 U.S.L.W. 4524 ..... 33, 39, 44

Williams v. Shaffer, 385 U.S. 1037 ..... 22, 29, 35

Winslow v. Zoning Board, 143 Conn. 381, 122 A.2d 789 (1956) 29

Young v. McFadden, 125 Ind. 254, 25 N.E. 284 (1890) 18

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution

Amendment 1 ..... 3, 15, 41, 46, 47, 49, 50
Amendment 14 ..... 3, 13, 15, 16, 27, 28, 30, 34, 46, 49, 50, 53, 56, 57

STATUTES:

28 U.S.C. §1257(2) 2
28 U.S.C. §2101(c) 3
42 U.S.C. §1401 ..... 6, 28
Mass. Gen. Laws ch. 239 §5 40
Mass. Laws 1969 ch. 366 40
Conn. Gen. Stat. §2-32 ..... 27, 60
Conn. Gen. Stat. §8-38 ..... 6, 28
Conn. Gen. Stat. §38-178 18
Conn. Gen. Stat. §51-265 3
Conn. Gen. Stat. §52-532 59
Conn. Gen. Stat. §52-534 ..... 17, 24, 44, 56
Conn. Gen. Stat. §52-542 ..... 2, 4, 6, 7, 8, 9, 10, 12, 14, 16, 19, 27, 32, 37, 39, 40, 52, 54, 57, 60
1969 Pub. Act 296 ..... 4, 16, 20, 27, 54, 57, 59, 60

OTHER AUTHORITIES:

Conn. Prac. Book §740 (1963 ed.) 3
Freed & Wald, BAIL IN THE UNITED STATES: 1964 (Record Press 1964) 52
Report of the National Advisory Commission on Civil Disorders (1968) 25, 26
Transcript of Proceedings, Conn. Gen. Assembly. The Senate. May 15, 1969 59
40A. Words & Phrases 18
Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964) 49

Page

LeBlanc, *Landlord-Tenant Problems*, Conference Proceedings, the Extension of Legal Services to the Poor 51 (U.S. Dep't of H.E.W. 1964) 23

Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966) 23

Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966) 23

Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) 42

Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) 33

Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968) 21, 35

Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969) 39, 41

Tenant Unions: Collective Bargaining and the Low-Income Tenant, 77 YALE L.J. 1368 (1968) 22-23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., *et ux.*,

Appellants,

vs.

WEST HAVEN HOUSING AUTHORITY,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

APPELLANTS' BRIEF

Appellants appeal from the judgment of the Appellate Division of the Connecticut Circuit Court, entered on March 1, 1968, dismissing their appeal from a judgment of eviction for failure to post a surety bond.

Opinion Below

The opinion of the Appellate Division is reported officially in 5 Conn. Cir. 282, and unofficially in 250 A. 2d 527.

Jurisdiction of This Court

The jurisdiction of this Court to review the decision of the Appellate Division of the Connecticut Circuit Court is invoked under 28 U.S.C. § 1257(2). A statute of the State of Connecticut, Conn. Gen. Stat. § 52-542, is drawn in question on the ground of its being repugnant to the Constitution of the United States; the Appellate Division's decision is in favor of its validity.

This is an action of summary process (eviction), commenced by the appellee, Housing Authority of West Haven (hereinafter referred to as Housing Authority), in the Eighth Circuit Court at West Haven, Connecticut, on July 19, 1967* (R. 2, pp. 6-7). On January 16, 1968, a judgment of possession was entered in favor of the Housing Authority (A. 5, 7). Timely appeal was taken by the appellants (hereinafter referred to as Tenants) on January 18, 1968 (A. 9), and on the same day a motion to waive the surety bond on appeal required by Conn. Gen. Stat. § 52-542 was filed, on the grounds that requiring such a bond for the indigent Tenants would violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Tenants offered their personal bond in lieu of a surety bond, and sought permission to pay the claimed rent into escrow as it became due, as security for the Housing Authority (A. 10). The latter motion was denied by the trial judge on January 19, 1968 (A. 23).

---

* Citations to the record shall include the Record number of the document, and, where possible, the page of the record. Where the Clerk has not indicated a record page number, a page reference will be to the page of the document. Citations to the Appendix shall be to the page of the Appendix.

On March 1, 1968, the Appellate Division of the Connecticut Circuit Court denied Tenants' motion to review the trial judge's refusal to permit a monthly deposit of rent in lieu of surety bond, and dismissed Tenants' appeal from the judgment of eviction because of their failure to post a bond with surety (A. 56, 60).

On June 25, 1968, the Supreme Court of Connecticut denied certification (A. 70), thereby making final the decision of the Appellate Division. Conn. Gen. Stat. § 51-265; Conn. Prac. Book, § 740 (1963 ed.); *State* v. *Cullum*, 149 Conn. 728, 729, 176 A. 2d 587 (1961).

Notice of appeal to this Court was filed on June 27, 1968, in the Eighth Circuit Court at West Haven (A. 71). Tenants' Jurisdictional Statement was filed with this Court on September 23, 1968, within the time provided for appeals by 28 U.S.C. § 2101 (c).

This Court noted probable jurisdiction on April 7, 1969.

Provisions of the United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

IX Gen. Stat. Conn., § 52-542

Sec. 52-542. Bond on appeal; stay of execution. When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-543 to 52-548, inclusive.

The statute has been amended[1] by the 1969 Connecticut General Assembly, effective October 1, 1969, as follows:

[1] The effect of this amendment is discussed at pp. 56-60, *infra*.

When any appeal is taken by the defendant in an action of summary process, he shall, *within the period allowed for taking such appeal or within three days from the fixing of the bond, whichever is later,* give a sufficient bond with surety to the adverse party *in such amount as the court, on its own motion or on motion of the parties, may fix* to answer for all rents *that have accrued from the commencement of the action to the date of judgment and for all rents* that may accrue [or, where no lease had existed, for the reasonable value for such use and occupancy,] during the pendency of such appeal, or which may be due at the time of its final disposal *or, where no lease had existed, for the reasonable value for such use and occupancy that had so accrued or may so accrue;* and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay *or unless the defendant fails to give bond, as herein provided;* and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-543 to 52-548, inclusive.

Question Presented

Whether the requirement of § 52-542 of the Connecticut General Statutes, that, as a condition precedent to their appeal from a judgment of eviction, the tenants post a bond with surety for rent which might accrue during the pendency of their appeal or which might be due at the time of its final disposal, regardless of their financial capacity to obtain such a bond and the availability of rational, nondiscriminatory methods of attaining the statute's purpose, deprived the tenants of liberty and property without due process of law and denied them the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution.

Statement of the Case

The Housing Authority operates a federally-assisted low rent housing project known as "Spring Heights" under the authority of 42 U.S.C. § 1401 et seq., and Conn. Gen. Stat. § 8-38 et seq. Tenants and their three minor children were residents of the Spring Heights project.

The Housing Authority brought an eviction action in the Connecticut Eighth Circuit Court at West Haven on July 19, 1967, alleging that Tenants had not paid their rent of $72.00 per month for the months of May, June and July, 1967 (A. 2). Tenants had stopped paying rent after the Housing Authority instituted a prior eviction action in May, 1967, based on nuisance (A. 27, 36).

On December 11, 1967,[2] Tenants filed an answer which denied the allegations of the complaint and affirmatively pleaded seven special defenses to the action (A. 27-30). Several of the defenses were addressed to the basic right of the Housing Authority under Connecticut law, to collect rent from Tenants, including its right to evict for non-payment of rent after the prior eviction had been brought.

Trial was had to the court on January 9, 1968, and judgment was rendered for the Housing Authority on January 16, 1968. The court's memorandum of decision (A. 5-6) contained no reference to the special defenses raised and briefed (A. 27, 34).

Believing the judgment to be erroneous, the Tenants sought to appeal, but were unable to obtain the bond with surety required by § 52-542 of the Connecticut General Statutes. That statute does not specify the amount of the bond to be posted, requiring a bond "sufficient" to save a landlord harmless from rent unpaid while an appeal is pending. No agreement was reached between Tenants and the Housing Authority as to the amount of the bond.

---

[2] Tenants were represented by counsel who filed on their behalf timely and appropriate motions, in accordance with Connecticut practice, attacking the jurisdiction of the court and the sufficiency of the complaint in the expectation of terminating the litigation before trial, and seeking pre-trial discovery necessary to allow Tenants to defend against the action (R. 3, 7, 8, 12, 13, 18). Although Tenants' motions were promptly filed and Tenants' counsel sought no adjournments, the pleadings were not closed until December 11, 1967, due primarily to administrative delays and errors. For example, Tenants' demurrer, filed on August 28, 1967, was scheduled for hearing on September 19, 1967. Over the objection of both counsel, the hearing was postponed to September 26, 1967, and the decision was filed on October 4, 1967 (R. 1, Docket Nos. 16-24). Tenants' motion for disclosure, also filed on August 28, 1967, was not disposed of until November 13, 1967 (R. 1, Docket Nos. 15, 26).

Therefore, Tenants were forced to estimate that, at the rate of $72.00 per month, the claimed rent (R. 2, p. 6), a bond of at least a few hundred dollars would be required to protect the Housing Authority from delays in the appellate process. No surety company would write such a bond without liquid collateral in the full amount of the bond (A. 11). The financial affidavit filed with Tenants' motion to waive the bond (A. 12-13) showed that Tenants had no liquid assets and over $800. in debts.

Accordingly, on January 18, 1968, Tenants filed their appeal and moved the Eighth Circuit Court to waive the requirement of a bond with surety and allow them to appeal upon their posting of a non-surety bond and upon the express condition that they deposit in escrow, each month during the pendency of the appeal, an amount equal to the rent claimed by the Housing Authority (A. 10). The motion was accompanied by a financial affidavit of Tenants and an affidavit of their counsel as to her unsuccessful efforts to obtain a surety (A. 11, 12).

That motion was denied on January 19, 1968 (A. 23).[3] At the same time, without notice or hearing, the trial judge found that the appeal was being taken "for the purpose of delay," the effect of such a finding being to allow the immediate eviction of the Tenants under a separate provision of the same statute, Conn. Gen. Stat. § 52-542.[4]

---

[3] Neither in its formal objection to the motion (A. 13) nor at the hearing on the motion (A. 14, 18, 19) did the Housing Authority raise any question as to Tenants' financial affidavit or their good faith. Tenants believe the latter is constitutionally irrelevant, in any case.

[4] To forestall their eviction, on January 30, 1968, Tenants filed an action in the federal court (No. 12388 D. Conn.) challenging the constitutionality of the statute and the acts of the trial judge

Before Tenants could have an appeal on the merits of the judgment of eviction, therefore, they now had to seek review of these actions of the trial judge, filing a motion for review in the Appellate Division of the Circuit Court on January 24, 1968 (A. 24). That motion urged upon the court the view that the statute, § 52-542, was unconstitutional in its demand of a surety bond even from those financially unable to obtain one.

On March 1, 1968, the Appellate Division denied the motion to review and dismissed the appeal for the failure to file a surety bond (A. 56, 60).[5] It reasoned that the right to appeal is not constitutional but is a statutory privilege to which one may resort only if he has strictly complied with the statutory provisions upon which such appeal is conditioned (A. 57, 58, 60).

Tenants petitioned the Supreme Court of Connecticut to certify the case for review, again arguing the unconstitutionality of § 52-542 (A. 64). Meanwhile the Housing Authority moved the Appellate Division to terminate the automatic stay of execution as provided for by the rules of the court, and that motion was granted on April 11, 1968 (A. 65, 66).[6] That decision is not on appeal here.

---

thereunder. The action was dismissed by agreement, when the Housing Authority represented it would not evict pending Tenants' motion to review.

[5] It did not in any respect base its decision on the trial judge's finding that the appeal was taken for the purpose of delay; nor, in arriving at its decision, did it discuss that finding or make such a finding independently.

[6] To forestall their eviction, on April 19, 1968, Tenants filed an action in the federal court (No. 12510 D. Conn.) alleging the unconstitutionality of Conn. Gen. Stat. §52-542, and of the action of the Appellate Division terminating the stay of execution. Tenants' request for a preliminary injunction to restrain their eviction was

Certification was denied on June 25, 1968 (A. 70). Notice of appeal to this Court was filed on June 27, 1968 (A. 71). A motion to stay enforcement of the judgment of eviction, pending this appeal, was denied by Justice Harlan on July 16, 1968. The Housing Authority obtained its execution on July 26, 1968 (R. 48).

Even though their appeal was dismissed, Tenants have deposited the claimed rent into court as it became due for five of the six months they were in possession after the judgment of eviction. *There is on file with the Eighth Circuit Court and with the Federal District Court for Connecticut a total of $360., as security for the Housing Authority in lieu of a surety bond, were Tenants' appeal to be allowed.*

Summary of Argument

I. The statutory requirement that tenants, before they can appeal their evictions, post a bond with surety to cover all rents that may become due while their appeal is pending presents a serious obstacle to most tenants and an insurmountable financial hurdle to the poor. Indigent tenants are relegated to the commercial surety company, which charges a fee for its services and demands collateral in the full amount of the bond, as occurred in this case. Since the bond may amount to several hundred dollars, the fee and collateral will be beyond the reach of the tenant in poverty, as they were for the tenants here.

---

denied, while retaining "for later consideration" the issues regarding Conn. Gen. Stat. §52-542. Tenants' appeal from this denial was dismissed as moot by the Second Circuit, since their eviction had not resulted from the action of the Appellate Division, but from the denial of certification by the Supreme Court of Connecticut. The action was dismissed voluntarily on August 3, 1968.

The legal effect of the failure to post the surety bond demanded is clear: dismissal of the tenant's appeal, as occurred in the case at bar. The tenant's appeal will be dismissed, even though financial inability precludes obtaining a surety bond, and even though the tenant can provide alternative security to the landlord, in a form better adapted to the latter's protection.

Just as the requirement of a transcript in *Griffin v. Illinois*, 351 U.S. 12, effectively prevented appeals by indigent defendants, so the unwavering demand of Connecticut law and landlords for a surety bond effectively bars poor tenants from the appellate process provided for all others.

II. Closing the courts of appeal in eviction actions has grave implications not only for the tenants involved but also for poor citizens as a class, for the legal system and for our society. Eviction from their home is obviously a calamity for poverty-stricken families, particularly in view of the shortage of low-income housing found to exist in most urban areas by Congress and the legislature. To lose that home summarily, without the opportunity to question the law's requirements or the court's action, is particularly harsh. The surety bond statute adds this burden to the poor tenant's lot.

Furthermore, the appellate process is the traditional route by which change of outmoded legal concepts is accomplished in our common law system. The law is bound to no more out-of-date notions than those springing from the feudal landlord-tenant relationship. In Connecticut, however, as in many other states, change through judicial reconsideration is foreclosed by an arbitrary precondition to tenants' appeals.

The legal system, too, suffers when trial judges are effectively freed from appellate supervision, particularly in cases where speed in disposition is emphasized to the degree it is in Connecticut's "summary process" for evictions. To the possibility of arbitrary action by a court secure in the knowledge it will not be reviewed is added the probability of error by a court hastening to render judgment.

Finally, what will be the consequences for a society which excludes citizens from its courts on grounds unrelated to the merits of their grievance? The presence of grievances among the poor and their lack of confidence in peaceful, legal ways of resolving them is well known. The unconditional demand for a surety bond from tenants, when they cannot provide it but can fulfill in other ways the law's legitimate goal, can only heighten these untoward tendencies.

III. Connecticut has denied to these Tenants their right of appeal from an eviction judgment when they were financially unable to purchase a bond with surety for the protection of the Housing Authority, their landlord, even though the Tenants proposed to provide security for rents lost as a result of their appeal in a way at least as well adapted as a surety bond to accomplish that admittedly legitimate objective. The constitutional consequences of the state's action are distinct in concept but alike in result: invalidation of the state statute which provided for this denial.

First, the State of Connecticut, by the statute in question, Conn. Gen. Stat. §52-542, and the actions of its courts in administering and enforcing the statute, effectively classifies appealing tenants on the basis of their financial ability

to obtain a surety bond. Those who can pay can appeal; those who cannot pay are foreclosed from appeal. Thirteen years ago this Court initiated a series of cases which have struck down the same type of economic discrimination over and over again. E.g., *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353.

Although most often these cases have involved defendants in criminal cases, the Court has not limited the reach of the equal protection clause to such matters. *Smith* v. *Bennett*, 365 U.S. 708; *Long* v. *District Court of Iowa*, 385 U.S. 192; *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. Neither the wording, history, nor principle of the equal protection guarantee suggest that civil litigation is beyond the pale of the Amendment. The seriousness of the matters involved in civil litigation (eviction, findings of child neglect, loss of government benefits, heavy money judgments, etc.) indicates that the time is ripe for a square holding that equal justice is an element of civil, as well as criminal, law.

There is ample support for that result. Wealth has been held to be a "suspect criterion," like race, for governmental classifications, *Harper* v. *Virginia Bd. of Elections, supra*, and, the classification effected by the Connecticut surety bond statute infringes upon a fundamental citizen interest, equal access to the courts. The strict scrutiny which this Court traditionally accords discriminations of either character will not leave standing a "blunderbuss method" of achieving a legitimate governmental objective when a less drastic means is available. *Shapiro* v. *Thompson*, —— U.S. ——, 37 U.S.L.W. 4333; *Carrington* v. *Rash*, 380 U.S. 89; *McLaughlin* v. *Florida*, 379 U.S. 184. The deposit of rent in escrow each month, while the appeal proceeds as offered

by the tenants in this case, is tailored to meet the statute's objective but does not burden the poor unjustly. Therefore, the classification which denies appeal to tenants only because they cannot purchase a surety bond must fall.

Even applying the conventional, permissive test to the classification at issue does not save it. For the statute lumps together both those who can and those who cannot secure their landlords from loss and burdens both classes with denial of an appeal if they cannot obtain the surety bond it demands. In other words, the class denied appeal is over-inclusive, does not include only those similarly situated with respect to the law's purpose, and is for that reason, unconstitutionally constructed. See, e.g., *Rinaldi* v. *Yeager*, 384 U.S. 305.

Equal protection of the laws, then, does not permit Connecticut to discriminate against its poor citizens in the manner of §52-542.

Second, the surety bond requirement operates to deprive tenants of their liberty and property without due process of law in several respects.

There is the due process clause's application, concurrent with the equal protection clause, to financial discrimination, *Griffin* v. *Illinois, supra.* In view of its failure to relate to the statute's purpose, conditioning tenants' appeals on their posting a surety bond, regardless of their ability to do so or to provide alternate security, is simply without reason. "[T]he constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons." *Id.* at 37 (dissenting opinion of Harlan, J.).

Furthermore, the Fourteenth Amendment's due process clause protects from state interference the First Amendment right to petition the courts for a redress of grievances, recently elucidated by this Court. *NAACP* v. *Button*, 371 U.S. 415; *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; *United Mine Workers* v. *Illinois Bar*, 389 U.S. 217. And where a state has chosen to extend a right to appeal, as Connecticut has in eviction cases, the scope of the constitutional right to litigate is similarly broadened.

Though not absolute, the right to litigate demands (1) a "compelling" state interest, (2) pursued by "means that [do not] broadly stifle fundamental personal liberties" before it will yield to limitations. *Bates* v. *Little Rock*, 361 U.S. 516; *Shelton* v. *Tucker*, 364 U.S. 479. Protection of the landlord's interest in continued rent collection can be achieved by a restriction far narrower than one which excludes from appeals those who cannot purchase a surety bond; it need only exclude those who cannot give security in an equally effective way. Thus, the legislature and the courts have too broadly restricted the right to litigate in eviction actions.

The surety bond statute effectively consigns the indigent tenant to the commercial insurance company and thus delegates to a private party, operating for profit, control over access to the courts. The potential for arbitrariness and favoritism and the absence of any check on the private party's actions in denying access lead to the conclusion that such delegation does not comport with due process principles. *Lane* v. *Brown*, 372 U.S. 477; *Anders* v. *California*, 386 U.S. 738.

The statute violates due process in yet another way: by giving the trial judge discretion to set the amount of the

appeal bond with no rational standard to guide him in exercising that discretion. The statute's vagueness on this score allows him to foreclose review of his own decisions.

Finally, a recent amendment of §52-542 compounds the practical and constitutional problems presented by the surety bond prerequisite. As of October 1, 1969, tenants must post a surety bond to cover back rents, as well as rents possibly lost pending appeal. Inasmuch as the landlord has not obtained and cannot obtain a judgment for rent in an eviction action, this stricture promotes no proper state purpose, and it deprives tenants of property without a hearing into their right to retain it. *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520. Thus, the amended version of the surety bond statute here in question also contravenes the due process and equal protection clauses of the Fourteenth Amendment.

ARGUMENT

I.

The Requirement of a Bond With Surety as a Condition Precedent to Appeal From a Judgment of Eviction Is a Serious Financial Obstacle to Access to Appellate Courts for Most Tenants. It Effectively Precludes Indigent Tenants From Appealing Their Eviction.

Summary process is a statutory form of action which took the place of ejectment, an action at law. The process is "summary" in that it is abbreviated for speed. Special provisions as to time are made for return dates, appearances, pleading and trial, all aimed at a judgment in the shortest time possible.

Because of this statutory abbreviation of the usual deliberate and considered progress of the law, it would seem that review of the proceedings is essential. Indeed, Connecticut provides for an appeal from judgment in a summary process action. Conn. Gen. Stat. §52-534. Due process of law in summary process, therefore, as regulated by state law, includes the right of appeal. *Walker* v. *Sauvinet,* 92 U.S. 90, 93.

The statute called into question by this appeal requires a tenant who wishes to appeal his eviction to

> "give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal. . . ."

Tenants here were willing to post bond, in the sense of a personal undertaking, and were willing to offer security by paying the claimed rent monthly into court but could not afford to post a bond with surety.[7]

The requirement of a bond with surety is strictly construed: it does not mean a bond with security. For example, in *Clinch Valley Lumber Corp.* v. *Hagan Estates Inc.*, 167 Va. 1, 187 S.E. 440 (1936), appellant executed a personal bond and in lieu of surety deposited a certified check in the amount of the bond. His appeal was dismissed for want of a surety.

The surety requirement was similarly insisted upon by the Appellate Division of the Connecticut Circuit Court in the decision on appeal here, even though Tenants offered to deposit rent monthly in court and file their personal bond.

> "A sufficient bond with surety is essential to a valid appeal." (A. 58)
>
> "Want of a bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal." (A. 60)

Although the statute in question demands a surety bond, it is indefinite as to the amount of the bond, since it requires a bond "to answer for all rents that may accrue . . .

---

[7] A surety, generally, is a person who binds himself for the payment of a sum of money, or for the performance of something else for another who is already bound for the same. *Young* v. *McFadden*, 125 Ind. 254, 25 N.E. 284 (1890); *Rawleigh Co.* v. *Warrington*, 199 Atl. 666 (Del. 1938); see *Bernd* v. *Lynes*, 71 Conn. 733, 43 Atl. 189 (1899); 40A. WORDS & PHRASES, Surety (1964). By statute, a surety may also be a surety company. Conn. Gen. Stat. §38-178.

during the pendency of such appeal or which may be due at its final disposal." Conn. Gen. Stat. §52-542. Tenants have surveyed the few cases in which evictions were appealed to determine the average appeal period. See Table I appended hereto. In the six cases where the time element could be determined, the shortest time between the judgment of eviction and the appellate decision was 34 days, the longest time 117 days, and the average time 80 days. On this basis, a tenant could expect to post a surety bond for up to four months rent. Since the rent herein was $72. per month, Tenants' bond might have been $216-288. They now have on deposit $360.

Where the parties cannot agree as to the amount of the bond, the trial judge sets the amount. *Housing Authority* v. *Jones,* 5 Conn. Cir. 350, 252 A. 2d 465 (1968). In *Montlick* v. *Bridges,* CV6-40074 (Sixth Cir. Conn.) where rent was $70. per month, the court set bond at $700., which was 10 months' rent. (A copy of that decision is annexed hereto as Exhibit A.)

No private bondsman would be surety for Tenants here without full cash collateral, which the indigent Tenants clearly could not supply. Even if a private bondsman were available, there would be an additional fee for his services. Without doubt, the surety bond requirement prevents appeal, for these Tenants and all indigent tenants. This Court has found financial requirements of substantially lesser amounts than those involved here to be intolerable barriers. E.g., *Burns* v. *Ohio,* 360 U.S. 252. Even middle class tenants, paying perhaps $200. per month rent, would be hard put, or loathe, to put up $600 to $2000 on short notice in order to appeal their eviction.

The statute in question is also unclear as to whether back rents are to be included in the amount of the bond. It has recently been amended by the Legislature, however, to require the bond "to answer for all rents *that have accrued from the commencement of the action to the date of judgment and for all rents* that may accrue," 1969 P.A. 296, even though a separate suit for unpaid rent is the ordinary procedure and no judgment for rent enters in summary process. Such a provision is, in effect, a penalty for exercising the statutory right to appeal, and compounds the practical and constitutional problems presented by the requirement of a surety bond.

The statute has now been amended to provide that execution may issue if the bond is not provided. Thus the landlord has absolute and arbitrary power to get possession of his premises and prevent an appeal where defendant is indigent, no matter how worthy the tenants' claims may be.

In practice, under the present statute, and more so under the statute as amended, an indigent cannot contest the eviction judgment.

Although Tenants could not post a bond with surety, they could (and did) pay the claimed rent monthly into court. The landlord may be better off with the rent in court rather than in the hands of a surety, which may vigorously contest its obligation to pay over the money.

Paying the rent monthly into court is fairer to both the landlord and tenant, since the appeal may go on for a longer or shorter time than originally estimated. The landlord would not be undersecured by too conservative a bond, nor the tenant overburdened by too harsh a bond. Where the amount of rent or the right of landlord to it is

not contested, the escrowee could pay it over to the landlord without delay, permitting the landlord, instead of the surety, use of the money pending appeal.

Yet the statute herein provides that an evicted tenant, in order to appeal, must post a bond of indefinite amount, possibly several hundred dollars, and must pay a fee to a bondsman, if he finds one willing to write a bond, to answer for rents for which no judgment has entered and no determination has been made as to amount or reasonableness, or even whether any rent at all is due and owing.

II.

Appellate Courts Must Not Be Closed to the Poor.

> "This Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke whatever truth there may be in the maxim de minimis." *Griffin* v. *Illinois,* 351 U.S. 12, 23 (Frankfurter, J., concurring).

Evictions, like convictions, may be unwarranted, arbitrary, or actually illegal, yet in the absence of judicial review they will stand unchallenged, "condemn[ing] one to an indeterminate sentence of inadequate housing or no housing at all." Willging, *Financial Barriers and the Access of Indigents to the Courts,* 57 GEO. L.J. 253, 270 (1968).

The instant case is a good example. Tenants properly raised in the state court several special defenses to the eviction action (A. 27-33) and thoroughly briefed and argued them (A. 34-52). Yet the trial judge's memorandum of decision summarily "finds the issues for the plaintiff [Housing Authority]," without discussion or explanation (A. 5, 6). When Tenants sought review of the judgment, they were met with the insuperable obstacle of posting a bond with surety in the amount of several hundred dollars. Their reasonable offer to save their landlord harmless from losses of rent, by depositing rent in escrow while the appeal was pursued (A. 10, 16, 19), was rejected.

The importance of equal access to the appellate process goes far beyond the remedying of individual injustices, however.

> "It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause." *Williams* v. *Shaffer,* 385 U.S. 1037.

Denial of access affects all the poor, not just those parties involved in litigation. The growth and development of the law depends on the adversary system. Outmoded legal doctrines change when they are challenged in the appellate courts by those who think they are no longer fair. The law as it affects poor persons is nowhere more bound to out-of-date concepts than it is in the area of landlord-tenant relations. See generally, Comment, *Tenant Unions: Collective Bargaining and the Low-Income Tenant,* 77 YALE

L.J. 1368, 1371 (1968); Le Blanc, *Landlord-Tenant Problems,* Conference Proceedings, the Extension of Legal Services to the Poor 51 (U.S. Dept. of H.E.W. 1964).

Many proposals have been made for using the judicial process to bring about reform in this field; e.g., Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches,* 54 CAL. L. REV. 670 (1966); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change,* 54 GEO. L.J. 519 (1966). But, if the appellate courts of Connecticut are closed to the poor, this avenue of legal reform is likewise closed.

The relationship between equal access to the courts and far-reaching substantive reform is vividly illustrated by the recent case of *Edwards* v. *Habib,* 397 F. 2d 687 (D.C. Cir. 1968). At an early stage of the appellate process, the indigent tenant was permitted to maintain her appeal upon conditions similar to those proposed by appellants in this case. *Edwards* v. *Habib,* 366 F. 2d 628 (D.C. Cir. 1965). The ultimate decision of the Court of Appeals that a landlord may not evict his tenant in retaliation for her reporting of housing code violations to governmental authorities is a landmark in the law of landlord-tenant relations, affecting hundreds of thousands of tenants in Washington, D.C. alone.

This Court itself has recognized the significance of litigation as a mode of law reform.

> "[U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button,* 371 U.S. 415, 430.

As Justice Harlan put it:

> "Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights." *Id.*, at 453 (dissenting opinion).

The poor are a minority in America today. If the courts are closed to them, particularly the courts of appeal, there can be no meaningful change in the law through litigation on their behalf.

Access to the appellate courts is particularly important in the area of eviction, to insure the integrity of the system of the law. Connecticut law emphasizes speed in summary process, requiring pleadings to go forward every three days, almost a physical impossibility when the mails must be used. Conn. Gen. Stat. §52-534. The burden this places on the courts, in addition to the press of regular business, cannot be doubted. But equally important is the burden of eviction on poor tenants.

Because the surety bond requirement makes the likelihood of an appeal minimal, the press of court business and the statute's emphasis on speed may cause less than due consideration to be given to a tenant's defenses.

Thus, to the possibility of arbitrary action by a court secure in the knowledge it will not be reviewed, is added the probability of error by a court hastening to render judgment. Only where an appeal is more than a remote possibility can our system of checks and balances operate to guarantee the fairness of the initial hearing.

There is yet another way in which the issue here assumes the greatest importance. The existence of summary

eviction procedures in which there is a substantial economic obstacle to a tenant's challenging the judgment of eviction places an enormous amount of arbitrary power in the hands of the landlord, which he exercises in collaboration with the state. Such imbalances of power, and the resentment they engender in the indigent citizen, have been pinpointed by the Report of the National Advisory Commission on Civil Disorders (U.S. Government Printing Office, 1968) (hereinafter referred to as *Report*) as a principal cause of tension, and resulting riots.

> "[G]hetto residents increasingly believe that they are excluded from the decision-making process which affects their lives and community. This feeling of exclusion . . . has engendered a deep-seated hostility toward the institutions of government." *Report,* p. 149.

Grievances concerning the inadequacy of housing for the poor and the discriminatory administration of justice were listed by the Commission as contributing factors to the riots which occurred in 1967. *Report,* p. 81. And the establishment of effective mechanisms for hearing and responding to the grievances of the poor was set as an immediate step toward reducing tensions which lead to riots. *Report,* p. 151.

The significance of the everyday disputes between landlords and tenants and the role of the legal process in resolving those disputes was pointed out in this passage from the Commission's report:

> "Among the most intense grievances underlying the riots of the summer of 1967 were those which derived from conflicts between ghetto residents and private

> parties, principally white landlords and merchants. Though the legal obstacles are considerable, resourceful and imaginative use of available legal processes could contribute significantly to the alleviation of resulting tensions. Through the adversary process which is at the heart of our judicial system, litigants are afforded a meaningful opportunity to influence events which affect them and their community." *Report,* p. 152.

But, did the Tenants here, blocked by the state's surety bond requirement from resorting to the appellate courts for review of their eviction, have a "meaningful opportunity to influence" this crucial event in their lives? Do other poor tenants in Connecticut, and in other states where such laws exist, perhaps wrongfully and arbitrarily deprived of their homes, have equally available to them the legal processes which can vindicate their claims and prevent their uprooting?

It is irrelevant to say that the state need not establish appellate review at all. For, as this Court said in *Griffin* v. *Illinois,* 351 U.S. 12, after conceding this point:

> "[T]hat is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18.

As pointed out above, the landlord may always appeal an adverse judgment; his indigent tenant may never appeal.

> "The State is not free to produce such a squalid discrimination." *Id.* at 24 (Frankfurter, J., concurring).

III.

Denying Tenants Access to Connecticut's Appellate Courts Because They Are Financially Unable to Give a Bond With Surety to Their Landlord Deprives Them of Liberty and Property Without Due Process of Law and Denies Them the Equal Protection of the Laws.

The Fourteenth Amendment of the United States Constitution forbids a state to "deprive any person of life, liberty or property, without due process of law" or to "deny to any person within its jurisdiction the equal protection of the laws." The Connecticut statute in question, Conn. Gen. Stat. §52-542, requires a tenant, as a precondition to his appeal from a judgment of eviction, to give a "sufficient bond with surety" to his landlord, "to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal. . . ."[8] The question presented by this case is whether this surety bond statute deprives persons unable to appeal because of its terms of their liberty and property without due process, or denies them equal protection of the laws.

Tenants have shown that the statute's requirement of a surety bond places a serious obstacle in the path of tenants in Connecticut when they seek to challenge eviction judg-

[8] The statute has recently been amended to require that the surety bond be in an amount sufficient to cover not only rents accruing during the appeal but also rent claimed to have accrued from the commencement of the action to the date of judgment in the trial court. P.A. No. 296 (Conn. Gen. Assembly 1969). The amended statute will take effect October 1, 1969. Conn. Gen. Stat. §2-32. See pp. 56-60, *infra*.

ments on appeal, an insurmountable obstacle in the case of poor tenants. The harmful consequences—to these tenants, to other indigent tenants, to the poor as a class, and to society—of thus closing the appellate courts have also been demonstrated. Reason, constitutional principle and precedent permit, indeed require, the court to remove this "money hurdle erected by [the] State," *Griffin* v. *Illinois,* 351 U.S. 12, 23 (Frankfurter, J.), and its unfortunate effects.

A. The Tenants' Interests in Possession of the Premises Are Protected by the Fourteenth Amendment.

This Court has rightly characterized shelter as one of the "necessities of life." *Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.W. 4333, 4335. The United States Congress (42 U.S.C. §1401 et seq.) and the Connecticut General Assembly (Conn. Gen. Stat. §8-38 et seq.) have recognized the importance and the peculiar difficulty for a low income family to obtain decent, safe and sanitary housing. For example, the latter has found (Conn. Gen. Stat. §8-38)

> that within the state there is a shortage of safe or sanitary dwelling accommodations available at rents which families of low and moderate income can afford and that such families are forced to occupy overcrowded and congested dwelling accommodations; that such conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state and impair economic values; that such conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection and other public services and facilities; . . . .

See also *Williams* v. *Shaffer,* 385 U.S. 1037, 1039 (dissenting opinion). Here, Tenants have been evicted from a low income housing project operated by the Housing Authority under the above-mentioned statutes.

A leasehold is a formal property interest in Connecticut. The landlord has conveyed the premises to the tenant for years or at will; the tenant has exclusive control and possession of the premises. *Jo-Mark Sand & Gravel Co.* v. *Pantanella,* 139 Conn. 598, 601, 96 A. 2d 217 (1953); *Carroll* v. *Cooney,* 116 Conn. 112, 115, 163 Atl. 599 (1933). Significantly, the Supreme Court of Connecticut has interpreted the words "property owner" in a zoning ordinance to include a lessee. *Winslow* v. *Zoning Board,* 143 Conn. 381, 386-87, 122 A. 2d 789 (1956).

This Court has stated:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." *Shelley* v. *Kraemer,* 334 U.S. 1, 10.

Not only Tenants' property, but also their liberty is at stake.

> "The liberty mentioned in [the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live* and work *where he will;* to earn his livelihood by any lawful calling; to pursue any livelihood or avocation,

> and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* v. *Louisiana,* 165 U.S. 578, 589 (Emphasis added.) *Accord, Bolling* v. *Sharpe,* 347 U.S. 497, 499.

It is plain, then, that the Tenants' loss is cognizable under the Fourteenth Amendment's due process clause.

B. The Requisite State Action Is Present.

The responsibility of the state for the deprivation effected by the surety bond requirement is equally clear.

The surety bond is required by state statute, and, as pointed out in part I, *supra,* effectively imposes strict financial criteria on those tenants who wish to appeal. Moreover, the courts of the state are intimately involved in the enforcement of the statute's requirement. *Shelley* v. *Kraemer,* 334 U.S. 1. It is the trial court which fixes the amount of the bond required, *Housing Authority* v. *Jones,* 5 Conn. Cir. 350, 252 A. 2d 465 (1968), and the appellate court will dismiss an appeal by a tenant for want of a surety bond, as occurred here (A. 62), *Housing Authority* v. *Jones, supra.* Moreover, in this case the tenants moved the trial court to waive the requirement of the surety bond and allow them to appeal upon their giving alternate security to the Housing Authority, pointing out the invidious effects of the statute (A. 10).

In denying that motion (A. 23, 62), the action of the state's judiciary confirmed the effect of the statute to deny on financial grounds the right of appeal.

C. The State's Prescription of a Surety Bond as a Condition Precedent to the Tenants' Appeal Effects Invidious Discrimination Among Tenants on the Basis of Wealth, and, Therefore, the Dismissal of the Appeal Because of Their Financial Inability to Provide Such a Bond Denied Them the Equal Protection of the Laws.

The effect of the surety bond requirement is to divide tenants who wish to appeal eviction judgments into two classes indistinguishable from each other except that one class is composed of tenants who can pay the fee and post the liquid collateral required before a surety company will provide the bond required by the statute, and the second composed of tenants who cannot meet these monetary standards. On the basis of this sole difference the first class is granted and the second class denied the right of appeal from a judgment which, unless reversed, will cost tenants the roof over their heads. The appellate courts are closed to the second class of citizens as effectively as if the state had a rule that only those tenants possessed of a certain amount of assets could appeal adverse decisions.

1. *The Equal Protection Clause Regulates Financial Discrimination Which Limits Access to Appellate Courts in Civil Cases.*

Thirteen years ago this Court began to give content to the phrase "equal protection" insofar as it limits discrimination by a state on the basis of wealth. *Griffin* v. *Illinois*, 351 U.S. 12. The Court began in *Griffin* with this premise:

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people

> charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17.

It concluded that:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

Moreover:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.* at 18.

On the basis of these principles this Court held that an indigent state prisoner could not be denied a free trial transcript, the transcript being in effect a prerequisite to appellate review of his conviction.

Similarly, the Connecticut statute challenged by this appeal, Conn. Gen. Stat. §52-542, makes the posting of a bond with surety for all rents that may accrue during the pendency of a tenant's appeal a prerequisite to appellate review of his eviction. Here, the Tenants' appeal was dismissed for want of the surety bond. The indigent tenant cannot post a surety bond because of his poverty; therefore, he cannot appeal because of his poverty, and for no other reason.*

---

* Connecticut has established an appellate procedure for review of eviction judgments. Because it has done so, whether appeal is

Moreover, as early as *Griffin* the Court made it clear that the right to equal access to the courts of appeal was independent of any general constitutional right of appeal.

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin* v. *Illinois, supra* at 18.

And just last term the Court restated its view, in *Williams* v. *Oklahoma City,* —— U.S. ——, 37 U.S.L.W. 4524.

The fact that the litigant in *Griffin* was a criminal defendant explains the Court's emphasis on the constitutional requirement of equal justice in criminal cases. But the equal protection clause need not be and should not be so limited in operation. It was intended to guarantee equal opportunity to exercise all civil rights, including the right to seek judicial redress of grievances:

> "The Fourteenth Amendment . . . undoubtedly intended . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. . . ." *Barbier* v. *Connolly,* 113 U.S. 27, 31.

---

ordinarily a "privilege" rather than a "right" becomes constitutionally irrelevant. *Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.W. 4333, 4335 n. 6; *Smith* v. *Bennett,* 365 U.S. 708, 713-14; *Frank* v. *Mangum,* 237 U.S. 309, 327. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

Indeed this Court has not restricted the force of this protection to criminal cases. The notion that merely because of a proceeding is styled a "civil" proceeding the protection of the Fourteenth Amendment is not available to prospective indigent litigants has already been rejected. *Smith* v. *Bennett*, 365 U.S. 708. There, a habeas corpus writ was not available to a state prisoner because he could not pay the customary $4.00 filing fee. The Court refused to "quibble as to whether in this context it [habeas corpus] be called a civil or criminal action." *Id.* at 712. The remedy sought to be invoked by the petitioner was an important one, and access to it could not be denied him because of his poverty merely by calling it a "civil" action.

While the unanimous *Smith* opinion is careful to limit itself to the case before it, *id.* at 713, what the case does indicate is the Court's willingness to look at the substance of the rights asserted and not be governed by mere labels. See also *In re Gault*, 387 U.S. 1; *Long* v. *District Court of Iowa*, 385 U.S. 192. The right to question the correctness of a decision which will cost a tenant and his family their shelter is surely a substantial one. The civil "label of convenience" should not foreclose recognition of this reality.

> "The so-called 'civil' problems of the poor may involve the defense of a landlord-tenant action for possession. Inability to defend this case for failure to post a bond or to obtain counsel will often result in an eviction from the premises—a result which in one sense is more of a deprivation of liberty than a suspended sentence, perhaps even more than incarceration. Imprisonment restrains the individual in his freedom of movement alone; eviction may condemn one to an indeterminate sentence of inadequate housing or no housing at all.

> This is not to say that the eviction process has no place in the law because of its harshness, any more than the criminal process should be condemned because it results in sending men to jail. But when the procedural fairness of the systems is in issue, it appears incongruous that the indigent tenant may be evicted without an opportunity for an impartial hearing, whereas the financial disabilities of the indigent criminal accused are studiously removed." Willging, *Financial Barriers and the Access of Indigents to the Courts,* 57 GEO. L.J. 253, 270 (1968).

As two Justices of this Court have said:

> "On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. . . . We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal . . . , or the right to file a habeas corpus petition . . . , or the right to obtain a transcript necessary for appeal. . . ." *Williams* v. *Shaffer,* 385 U.S. 1037, 1039 (dissenting opinion).

In the case of *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, the Court again indicated that the application

of the equal protection clause to economic discrimination would not be limited to criminal prosecutions. There the state's requirement of a $1.50 poll tax was held to deny equal protection to those citizens unable to pay it and, therefore, unable to vote.

Other courts have similarly declined to limit the clause to criminal cases. See, e.g., *Barber* v. *Gladden,* 298 P. 2d 986 (Ore. 1956) (bond on appeal from dismissal of habeas corpus petition); *Bynum* v. *Comm'n on Forfeited Rights,* 410 F. 2d 173 (2d Cir. 1969) ($5.00 fee for administrative hearing re restoration of voting rights); *Robertson* v. *Greene,* No. 336-565, Ore. Circuit Court, Multnomah County, June 14, 1967 (filing fees in divorce action); *Jeffreys* v. *Jeffreys,* 57 Misc. 2d 416, 296 N.Y.S. 2d 74 (Kings Co. 1968) (publication costs in divorce proceedings); *Sanks* v. *Georgia,* No. 266, O.T. 1969 (lower court decision) (bond in eviction proceedings).

Griffin and its progeny, then, make clear that "lines drawn on the basis of wealth or poverty, like those of race . . . are traditionally disfavored." *Harper* v. *Virginia Bd. of Elections, supra* at 669. Summing up its decisions in this area, the Court has recently said:

> "Our decisions for more than a decade now have made clear that *differences in access to the instruments needed to vindicate legal rights,* when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts* v. *LaVallee,* 389 U.S. 40, 42. (Emphasis added.)

2. *The Financial Discrimination Effected by Conn. Gen. Stat. §52-542 Does Not Promote a Compelling State Interest, Nor Is It Rationally Related to the Attainment of a Legitimate State Objective.*

To say that the right of equal access to the appellate courts is guarded by the equal protection clause is not to say that a state may never regulate that right. Nor is a state prevented from making distinctions among its citizens. At a minimum, however, the state's classification must be rationally related to the attainment of a legitimate objective of governmental action. See, e.g., *Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573, 578. More importantly, where the state's classification is based on certain suspect criteria or affects rights deemed particularly important, mere rational relationship between the classification and the end sought will not justify the discrimination; a showing that the classification is necessary to promote a compelling governmental interest is required. *Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.W. 4333, 4338. The economic discrimination effected by the statute in question fails either test.

a. The Statute's Classification Is Based on a Suspect Criterion, Adversely Affects a Fundamental Citizen Interest, Yet Is Not Necessary to Promote a Compelling Governmental Interest.

This Court has placed state discrimination among citizens on the basis of wealth in the same "traditionally disfavored" category as discriminations on the basis of race or color. *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 669. State laws trenching upon freedom from official discrimination based on race have been held to be "'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' . . . and 'in most circumstances irrelevant' to any

constitutionally acceptable legislative purpose. . . ." *McLaughlin* v. *Florida,* 379 U.S. 184, 192, and cases there cited.

Thus, a law which discriminates on the basis of poverty should be equally disfavored. Like a racial classification,

> "Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida, supra* at 196.

Treating discrimination against poor citizens the same as discrimination against black citizens is in keeping with the highest purposes of the equal protection clause, as stated in *Hernandez* v. *Texas,* 347 U.S. 475, 478:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

There seems little question that this Court, in view of its unbroken line of cases striking down various forms of pecuniary classification, has applied this stringent test.

See *Shapiro* v. *Thompson, supra,* 37 U.S.L.W. at 4345 (dissenting opinion of Harlan, J.).

The Connecticut surety bond statute also constitutes a serious obstacle to access to the courts of the state and, therefore, adversely affects a most important interest of all citizens. Thus, there is a second ground for demanding a showing that the statute is necessary to attain the state's purpose. The critical nature of access to the courts, particularly the appellate courts, is discussed elsewhere in this brief. See part II, *supra.* The point need not be belabored; this Court's recognition of it is testified to by cases from *Griffin* to *Williams* v. *Oklahoma City,* decided last term.

The effect, in constitutional terms, of a holding that a classification is based on a suspect criterion, like wealth, or affects a fundamental citizen interest, like access to the courts, is invalidation of the statutory classification, unless its *necessity* to achieve a *compelling* governmental interest is clear. *Developments in the Law—Equal Protection,* 82 HARV. L.REV. 1065, 1101, 1121 (1969). The aim of §52-542 is fairly clear: to protect a landlord from the loss of rents he might have collected had the appealing tenant vacated, pursuant to the eviction judgment, and the landlord rented the premises to another. And, the tenants here do not question the legitimacy of the state's objective.[10] But, is this interest of such a magnitude as to allow the state to pursue it by eliminating appeals by all those too poor to give the landlord a surety bond? Is the requirement of a surety bond as a prerequisite to appeal necessary to achievement of the state's purpose? In view of the "less

[10] Tenants do, however, challenge the legitimacy of the state's objective under the amended version of §52-542. See pp. 56-60, *infra.*

drastic means" available to attain the end of the statute, *Shapiro* v. *Thompson, supra* at 4338, the answer must be negative.

Each of the two bonding companies that expressed a willingness to write the type of bond required by §52-542 demanded cash collateral in the full amount of the bond (A. 11). Since this could have amounted to several hundred dollars (see part I, *supra*), it was impossible for the tenants to comply and, therefore, unless the requirement of a surety bond was waived, impossible for them to appeal.

They offered a perfectly reasonable alternative: the deposit of each month's rent, as it became due, in escrow with the court or some responsible person (A. 10, 16).

Their failure to deposit the rent as it became due would have been grounds for dismissal of the appeal (A. 19). But this rational approach to the problem was rejected by the Housing Authority and the trial judge.[11]

The payment of rent, or use and occupancy charges, into escrow with the court or some responsible person or entity while the appeal proceeds would protect the landlord at least as well as a surety bond from the loss of rents due him. The landlord would not be undersecured nor the tenant overburdened because of a wrong guess as to the length of the appeal period. (See part I, *supra*.) And it would not pose the same kind of problem as the requirement, prompted by the present statute, that an indigent tenant produce, in five days, a large cash sum (or some

---

[11] Massachusetts has recently amended its summary process statute to allow the waiver of the appeal bond requirement. The statute, as amended, does not require an alternate form of security. Mass. Gen. Laws ch. 239, §5, as amended by Mass. Laws 1969 ch. 366.

other form of liquid collateral), an impossibility for most poor persons.[12]

Thus, the demand of a surety bond, at the same time as it closes the courts of appeal to the poor, is unnecessary to the statute's purpose, protection of the landlord. To paraphrase this Court's opinion in the welfare residency cases: Since the landlord's interests can be protected by the deposit of rent in escrow as the appeal proceeds, "it is unreasonable to accomplish this objective by the blunderbuss method of denying" appeals to all tenants who cannot obtain a surety bond. *Shapiro* v. *Thompson, supra* at 4339.

This approach, similar to the concept of overbreadth employed in First Amendment cases, is traditional when this Court views classifications drawn on suspect lines or which impair some fundamental interest. See, e.g., *McLaughlin* v. *Florida, supra; Carrington* v. *Rash,* 380 U.S. 89.

> "Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn, the Court will demand a convincing demonstration that the classification is well tailored to achieve the statutory objective. . . . The State must show at least that this classification is more than just one of several reasonable ways of achieving its goals." *Developments in the Law—Equal Protection, supra* at 1122.

---

[12] Not only the destitute find it difficult to meet these standards. Most middle-income tenants would have difficulty amassing the liquid collateral for a bond perhaps ten times their monthly rent of, say, $150-200. A small businessman, paying $250-300 per month for his premises, may likewise be hard pressed to raise $2500-3000 in liquid collateral within five days.

b. The Statute's Classification Is Not Rationally Related to a Legitimate State Objective.

Even applying the less stringent "rational relationship" test to the surety bond statute compels the conclusion that the statute must fall. For it violates one of the basic strictures for a valid classification; viz., it does not include in the classes it creates all and only those persons similarly situated with respect to the purpose of the law. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415; Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L.REV. 341, 346 (1949).

The statute's purpose is to save the landlord harmless from losses of rent brought on by the tenant's appeal and consequent retaining of possession. But it excludes from appeals both those who can and those who cannot provide security to the landlord, because the ability to give a surety bond is not related to the ability to protect the landlord. As pointed out above, there are other ways of effecting the latter. Thus, the state's classification burdens persons in a way unrelated to its purpose. Such an "over-inclusive classification" is not permitted by the equal protection clause.

> "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Rinaldi* v. *Yeager,* 384 U.S. 305, 309.

In *Rinaldi* this Court invalidated a New Jersey statute requiring incarcerated defendants to reimburse the state

out of their prison pay for the cost of transcripts provided in connection with their unsuccessful appeals *in forma pauperis*. Insofar as the statute was intended to deter frivolous appeals, the Court found that, in its requirement of reimbursement from all incarcerated prisoners, it included both frivolous and non-frivolous, albeit unsuccessful, appellants.

A Texas statute denying the vote to all servicemen stationed in that state, including those who had established a permanent residence there, was struck down in *Carrington* v. *Rash*, 380 U.S. 89. Welfare residency laws were found constitutionally deficient because, though they were justified as an attempt to discourage only those indigents who would travel from state to state solely to obtain larger benefits,

> "none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits." *Shapiro* v. *Thompson, supra* at 4337.

In the case at bar the class of barred appellants-tenants is all-inclusive, lumping those who can provide security to their landlord (albeit not a surety bond) with those who cannot. In effect, the statute enacts an irrebuttable presumption that tenants who cannot post a surety bond cannot secure their landlords from loss. Such a presumption is belied by the facts.

Since the ability of the tenants to give a bond with surety is unrelated to their ability to secure the landlord, there is no defensible interest served by focusing on the former as a classifying feature in a statute with the latter

as its purpose. Thus, the surety bond statute fails even the traditional equal protection tests.

D. The State's Prescription of a Surety Bond as a Condition Precedent to the Tenant's Appeal Is Not Reasonably Related to a Legitimate State Objective, and, Therefore, the Dismissal of the Appeal Because of Their Financial Ability to Provide Such a Bond Deprived Them of Liberty and Property Without Due Process of Law.

Connecticut's procedure in eviction actions wisely includes an appeal from the judgment of the trial court to the Appellate Division of the state Circuit Court. Conn. Gen. Stat. §52-534. Therefore, it makes no constitutional difference that the state need not have created this additional step.

> "[I]t is now fundamental that, once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams* v. *Oklahoma City*, —— U.S. ——, 37 U.S.L.W. 4524.

The due process of law which must be accorded tenants before they are deprived of the liberty and property interests represented by their leasehold includes in Connecticut appeals from eviction judgments. *Frank* v. *Mangum*, 237 U.S. 309, 327; *Walker* v. *Sauvinet*, 92 U.S. 90, 93.

States may, of course, impose reasonable conditions on the right to appeal, such as fixing the time within which an appeal may be taken, delimiting the scope of review, and establishing the procedure by which alleged errors may be brought before the appellate tribunal.



"But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society." *Griffin* v. *Illinois, supra* at 21-22 (Frankfurter, J.).

This concept is but an extension to appeals, when they are provided by the state, of what has long been the law regarding rights of action generally.

"The Fourteenth Amendment does not prevent a State from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." *Jones* v. *Union Guano Co.*, 264 U.S. 171, 181.

The prerequisite of a surety bond, however, is not reasonably related to the only legitimate state interest, protecting the landlord from rents lost as a result of the appeal. For such protection can be provided in alternate ways, as is pointed out *supra*, pp. 42-43. Therefore, it "bears no relation to a rational policy of . . . appeal" and, in its emphasis on wealth as the key to judicial review, it offends one of the deepest presuppositions of our society, equal justice under law.

"[T]he constitutional right under the Due Process Clause is simply the right not to be denied an appeal

for arbitrary or capricious reasons." *Griffin* v. *Illinois*, *supra* at 37 (dissenting opinion).

Since the giving of a surety bond is unrelated to any legitimate governmental object, it is not a reasonable or appropriate condition precedent to appeal. Dismissal of the Tenants' appeal when they failed, because of financial inability, to provide the surety bond was an arbitrary and capricious denial of their appeal.[13]

E. The Dismissal of the Tenants' Appeal Because of Their Financial Inability to Post a Surety Bond Violated Their Right to Petition the Government for Redress of Grievances.

1. *The Constitution Establishes a Right to Litigate, to Petition the Courts for a Redress of Grievances.*

One of the rights specifically protected by the First Amendment to the U. S. Constitution is the right of the people "to petition the Government for a redress of grievances." This right, protected against federal incursion by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the states. See, e.g., *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-77, and cases there cited.

In a series of recent cases, this Court has recognized that litigation is a form of petition, for judicial redress of grievances. *United States* v. *Robel*, 389 U.S. 258, 282 n. 1 (White and Harlan, JJ., dissenting). With the case of

---

[13] The imposition of an arbitrary condition to the right of appeal adversely affects *all* tenants, not just those too poor to meet it. For its very presence may serve to deter exercise of the right, and, in the case of this surety bond statute, deprives of the use of the fee and collateral required even those who can and do meet those conditions. Cf. *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520, 4521 (Opinion of Harlan, J.).

NAACP v. *Button*, 371 U.S. 415, this Court began to make clear that the right to repair to court for a resolution of grievances is included within the freedoms of expression guarded against federal and state intrusions. Indeed, said the Court (at 430):

> "[U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances."

In *Button* the NAACP's activities in advising Negroes of their constitutional rights, encouraging their assertion through litigation, providing lawyers to conduct the suits and financing the actions was held paramount to Virginia's interest in regulating the practice of law. The Court referred to First Amendment rights to enforce constitutional rights through litigation (371 U.S. at 440), and its opinion emphasized the importance of litigation as a "means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local". (371 U.S. at 429).

Subsequently, *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1, vindicated the rights of railroad workers to carry on a joint plan to advise their injured brothers to obtain legal representation in obtaining compensation and to recommend specific lawyers to handle such litigation.

The litigation concerned in the *Trainmen* case was not of constitutional scale; it was not a "form of political expression," as the Court found to be present in *Button*, 371 U.S. at 429. It involved merely suits for money recovery, for damages suffered. Yet, the Court held:

> "The State can no more keep these workers from using their cooperative plan to advise one another than it

could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts* cannot be so handicapped." 377 U.S. at 7. (Emphasis added.)

In *United Mine Workers* v. *Illinois Bar,* 389 U.S. 217, the Illinois Supreme Court had limited the decision in the *Trainmen* case to plans which, though they involved advice to consult specific attorneys, stopped short of employing attorneys to represent union members. It also had limited the applicability of *NAACP* v. *Button* to litigation that could be characterized as "political expression." But this Court rejected both limiting constructions.

> "We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.' *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). See *DeJonge* v. *Oregon,* 299 U.S. 353, 364 (1937)." 389 U.S. at 222.

The Court went on to hold that these rights were endangered as much by "indirect restraints" as by laws specifically prohibiting their exercise, and that even legislation "enacted for the purpose of dealing with some evil within the State's legislative competence, . . . [and] in fact provid[ing] a helpful means of dealing with such an evil" cannot be sustained if it "actually affect[s] the exercise of these vital rights." *Ibid.*

Invoking these principles the Court squarely held

> "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-222.

The rights guaranteed by the First Amendment are the rights of individuals—to speak freely, to petition and to assemble. The right of association is merely an extension of this individual freedom, a "method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties." Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1, 4 (1964). *Accord, NAACP* v. *Alabama,* 357 U.S. 449, 460. Though in each of the three cases discussed above the petitioner was an organization, none of the litigation involved in any of the cases was litigation by the organization.

Therefore, it is clear that the right with which the Court is concerned is the right of the individual, not the organization, to litigate. So understood, *Button, Trainmen* and *United Mine Workers* confirm the existence of a federal constitutional right, protected by the First and Fourteenth Amendments, to litigate, to petition the courts for a redress of grievances. *U. S.* v. *Robel,* 389 U.S. 258, 282 n. 1 (dissenting opinion).

Where the state has provided for appellate review, the right to litigate must encompass the right to review. For the value of the right to petition the courts of first instance is intimately tied to the right of review. *Cole* v. *Arkansas,* 333 U.S. 196, 201, 202; *Frank* v. *Mangum,* 237 U.S. 309, 327; *Griffin* v. *Illinois,* 351 U.S. 12, 18, 23. There the Court said:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."

The absence of the right of review removes one of the principal restraints on arbitrary conduct in passing on petitions for redress in the trial court. The right to a hearing before deprivation of important rights, recently reaffirmed by this Court, *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520, is denigrated where the procedures or outcome of the hearing cannot be questioned.

> "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct in a criminal trial. . . ." *Coppedge* v. *U. S.*, 369 U.S. 438, 455-56 (Stewart, J.).

Connecticut promises to tenants a right to litigate the issues involved in their eviction, including a right to appeal the decision of the trial court. In this context the right to litigate, the right to a hearing encompasses the right to review.

2. *The Surety Bond Statute Is an Overly Broad Restriction of the Right to Litigate.*

As a freedom protected by the First and Fourteenth Amendments, the right to petition the courts is not an absolute, illimitable right, but it is entitled to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 530. The special

protection afforded these freedoms requires the state to show a "compelling" state interest to which these personal liberties are subordinate. *Bates* v. *Little Rock,* 361 U.S. 516, 524. Moreover,

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488.

See also *U. S.* v. *Robel,* 389 U.S. 258; *NAACP* v. *Button,* 371 U.S. 415, 433, 438.

As stated above, the Tenants do not quarrel with the state's decision to protect the landlord. But, simply denying appeals to all those unable to purchase a surety bond paints with far too broad a brush, excluding from the appellate process many tenants who can secure the landlord, along with those tenants who cannot. Such a sweeping restriction on the right to litigate, as expanded by the State of Connecticut to include appellate review, suffers from the vice of "overbreadth" condemned by this Court so often. Here, too, condemnation is appropriate.

F. The Empowering of a Private Party, the Surety Required by §52-542, to Grant or Withhold Access to the Appellate Courts Violates the Due Process Clause.

There is yet another way in which the surety bond statute effectively deprives the tenants of liberty and property

without due process. The statute places in the hands of a private party, the surety, whether he be a friend or relative of the tenant or a surety company, the untrammeled power to grant or withhold access to its appellate courts. It makes the answer to a tenant's petition for redress of grievances turn on a commercial transaction; indeed, whether the tenant may petition at all depends on whether he can meet the surety's terms, in this case, pay his fee and furnish collateral.

Tenants are well aware that requirements of surety bonds appear often in our law. But, to paraphrase Justice Frankfurter, the admonition of De Tocqueville not to confuse the familiar with the necessary (or the right) has vivid application to the law's demand for bonds. *Griffin* v. *Illinois,* 351 U.S. 12, 20 (concurring opinion).

When one considers the documented abuses of the bondsman's function in criminal cases, Freed and Wald, BAIL IN THE UNITED STATES: 1964, 22-38, and recalls this Court's holding that "a vested cause of action is property and is protected from arbitrary interference," *Gibbes* v. *Zimmerman,* 290 U.S. 326, 332, it does not seem unreasonable to question the constitutionality of §52-542 on this ground. In demanding a surety bond the statute and the courts, in enforcing the statute, subject the tenant to the unregulated caprice of the surety.

The surety has unlimited power to refuse to write a bond for any individual for any reason, however capricious and unrelated to the concerns of the statute requiring a bond. Also, although the premium on the bond may be regulated, there is no supervision over the amount which the surety may demand as collateral. The court fixing the

amount of the bond may assume that the litigant is faced only with the legal premium, while the reality may be, as here, that he will be required by the surety to put up collateral equalling the entire amount of the bond. The surety thus becomes the arbiter of whether the litigant proceeds with his case, not the court or the legislature.

Without any legal or social duty to grant a bond, his motivation at best is simply a matter of dollars and cents; at worst, a compound of every arbitrary and discriminatory urge to which unlimited and irresponsible power is prey.

An unwavering demand for a surety bond, and the consequent relegation of the tenants to the bondsman's whims, cannot be squared with the due process clause of the Fourteenth Amendment. This conclusion is supported by the decisions of this Court in *Eskridge* v. *Washington State Board,* 357 U.S. 214; *Lane* v. *Brown,* 372 U.S. 477; and *Anders* v. *California,* 386 U.S. 738.

In *Lane* v. *Brown, supra,* at 485, this Court said

> "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards."

At least in *Lane* and *Anders,* the indigent's appeal depended upon the decision of an attorney, an officer of the court. Here it is a private individual, outside the judicial system, in business for profit, who can "take from an indigent all hope of any appeal at all."

G. The Surety Bond Statute Is Unconstitutionally Vague as to the Amount of the Bond Required, Thus Empowering the Trial Judge to Arbitrarily Prevent Review of His Own Decisions.

The Connecticut statute in question, §52-542, is indefinite as to the amount of the bond to be given by tenants, stating only that it should be

> "sufficient . . . to answer for *all rents that may accrue* or, where no lease had existed, for the reasonable value for such use and occupancy, *during the pendency of such appeal, or which may be due* at the time of its final disposal. . . ." (Emphasis added.)

(The recent amendment does not cure the vagueness, for it merely makes clear that rent claimed to have accrued since the commencement of the action is included, leaving unchanged the quoted language.)

The trial court sets the amount of the bond, *Housing Authority* v. *Jones*, 5 Conn. Cir. 350, 252 A. 2d 465, 468, "on its own motion or on motion of the parties." P.A. No. 296 (Conn. Gen. Assembly, 1969).

Since the period of appeal is indefinite, the amount of the bond is uncertain. The effect of the statute is to allow trial judges in eviction actions to foreclose review of their own actions, no matter how arbitrary and no matter how grave the consequences to tenants by setting a bond which the tenant is unable to meet. Combined with the holding of the Appellate Division in this case that no security other than a surety bond will suffice, this power to prevent review is formidable and, in the case of the poverty-stricken tenant, absolute.

This statute fundamentally affronts the rule of law embodied in the due process clause by permitting arbitrary and erratic judicial activity. Concern for this consequence has been evident in this Court's vagueness decisions. E.g., *Herndon* v. *Lowry,* 301 U.S. 242, 263; *NAACP* v. *Button,* 371 U.S. 415, 433; *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 403. Justice Frankfurter was most eloquent in addressing himself to this danger.

> "[L]egislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion. . . ." *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U.S. 684, 694 (concurring opinion).
>
> "[D]iscretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged." *Brown* v. *Allen,* 344 U.S. 443, 496 (separate opinion).

The criterion for the exercise of discretion must not be "susceptible of sweeping and improper application," *NAACP* v. *Button, supra,* at 433, or "merely a shelter for . . . judges to respond according to the individual will." *Brown* v. *Allen, supra,* at 496.

> "Discretion without a criterion for its exercise is authorization of arbitrariness." *Ibid.*

Moreover, the Court has made clear its realization of the import of these propositions for review of federal district judges' certifications that an appeal *in forma pauperis* is not taken in good faith.

> "Such certification is not final in the sense that the convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed.

> Of course, certification by the judge presiding at the trial carries great weight but, *necessarily, it cannot be conclusive." Johnson* v. *U. S.*, 352 U.S. 565, 566 (*per curiam*). (Emphasis added.)

This Court has condemned provisions which permit a trial judge to review his own decision and to prevent an indigent from taking an appeal as constitutionally invalid. *Coppedge v. U. S.*, 369 U.S. 438. See *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Draper* v. *Washington*, 372 U.S. 487; *Anders* v. *California*, 386 U.S. 738.

The power placed in the trial judge's hands may be exercised by him without reference to any rational standard since the period of appeal is so indefinite. The practical effect of the statute is to make his decision as to the amount of bond conclusive of proceedings to review his *actions. Where lower court proceedings are summary*, decisive and critical to the litigant, as they were to the Tenants here, the Constitution demands that review of those proceedings not be at the sufferance of the trial judge.

II. The Surety Bond Statute, Insofar as It Requires a Bond Sufficient to Cover Rents Claimed to Have Accrued While the Action Was Pending in the Trial Court, Violates Both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

A landlord may obtain through the statutory "summary process" remedy in Connecticut only a "judgment . . . that [he] recover possession or occupancy of the premises with his costs." Conn. Gen. Stat. §52-534. He may not recover a judgment for rent. *Feueck* v. *Nowakowski*, 146 Conn.

434, 151 A. 2d 891 (1959); *Housing Authority* v. *Alprovis*, 19 Conn. Sup. 37, 109 A. 2d 884 (1954); *Pollard* v. *Pollard*, 1 Conn. Cir. 143, 177 A. 2d 471 (1961); see *Cianciolo* v. *Plano*, 1 Conn. Cir. 206, 181 A. 2d 611 (1962).

Prior to amendment, §52-542 was not clear about the necessity for a bond to cover rents claimed to have accrued while the action progressed through the trial court; in addition to answering for rents that might accrue during the appeal, the surety bond was to answer for rents "which may be due at the time of [this appeal's] final disposal." And, the trial judge in the case at bar indicated that he might construe the statute to require such a bond (A. 17). Public Act 296 of the 1969 regular session of the Connecticut General Assembly resolved this question of interpretation (and compounded the constitutional deficiencies of the statute). The bond with surety must be

> "sufficient . . . to answer for all rents that have accrued from the commencement of the action to the date of judgment,"

as well as rents accruing during the appeal.

Requiring, as a condition precedent to appeal from an eviction judgment, a bond with surety in an amount sufficient to cover sums of money to which no court has ever held the landlord entitled promotes no legitimate state objective and deprives tenants of their property without a hearing, in contravention of the due process and equal protection clauses of the Fourteenth Amendment.

1. *The Amended Statute Deprives Tenants of Their Property Without a Hearing.*

Just last term this Court reaffirmed the necessity of notice and hearing before a citizen may be deprived of his property. *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520. The amended version of the Connecticut surety bond statute requires a tenant to part with the fee and liquid collateral necessary to obtain the inflated surety bond in advance of any adjudication that the landlord is entitled to the rent claimed. The very question on appeal may be, as it is in this case (A. 28, 29), the right of the landlord to collect rent at all or in the amount claimed. The garnisheed wages involved in *Sniadach* amounted to slightly more than sixty dollars; the amended surety bond statute requires the tenants to put up hundreds, perhaps thousands, of dollars as a condition to their appeal, without a hearing on the landlord's claim of rent.

2. *The Amended Statute Furthers No Legitimate State Purpose.*

In Tenants' earlier arguments regarding equal protection and due process (sections C, D, and E of part III, *supra*), the legitimacy of the state's purpose in requiring protection for the landlord from rents lost while the appeal proceeds was conceded. The presence of such a proper objective is the *sine qua non* of governmental discrimination and regulation of citizens' rights, and this Court has struck down state action where such a purpose was lacking. *Shapiro* v. *Thompson*, —— U.S. ——, 37 U.S.L.W. 4333, 4335-37; *Carrington* v. *Rash*, 380 U.S. 89.

No such objective is apparent in the requirement of a bond to cover claimed back rents. The landlord has no money judgment for such rents that the legislature or

appellate courts might seek to protect. Compare *Nat'l Union of Marine Cooks and Stewards* v. *Arnold*, 348 U.S. 37. In fact, the issues involved in the eviction judgment may well be totally unrelated to the rent due; e.g., whether the tenant was a nuisance or violated conditions of his lease. Even where the eviction is for nonpayment of rent, the landlord need allege and prove only nonpayment for one month. Conn. Gen. Stat. §52-532. A judgment in his favor on that ground, therefore, says nothing about rent he may claim for subsequent months. And, as pointed out above, where the landlord's right to collect the claimed rent is at issue on the appeal, the effect of the amended statute is to deprive the tenant of the enjoyment of that sum while he contests the landlord's right to it.

The surety bond required by 1969 Pub. Act 296 is simply obstructive and invidiously discriminatory as to the poor, without promoting any proper purpose.[14] Therefore, as a

---

[14] Tenants' research of the legislative history of P.A. No. 296 (House Bill No. 7543) indicated that no public hearings were had on the legislation. It passed the House of Representatives on the "consent calendar" without discussion and passed the Senate without discussion. The following is the transcript of its passage in the Senate:

> The Clerk: Calendar No. 823, File No. 679. Favorable report of the Joint Standing Committee on Judiciary and Governmental Functions. On House Bill No. 7543. An Act Concerning Bonds on Appeals in Summary Process Actions.
>
> Senator Fauliso: Mr. President, I move acceptance of the Committee's favorable report and passage of the bill.
>
> The Chair: Question is on acceptance of the Committee's favorable report and passage of the bill, will you remark.
>
> Senator Fauliso: Mr. President, the posting of the bond merely insures the payment of the rent while the appeal is pending. I urge passage.
>
> The Chair: Any further remarks. If not, as many who are in favor signify by saying aye, contrary minded. The bill is passed.
>
> *Transcript of Proceedings*, Conn. Gen. Assembly. The Senate. May 15, 1969 pp. 62-63.

condition precedent to appeal, it contravenes both the due process and equal protection clauses.

1969 Pub. Act 296 is effective on October 1, 1969, Conn. Gen. Stat. §2-32, and, therefore, will be in operation before the Court decides this case. Moreover, as pointed out above, the present version of §52-542 is susceptible to a literal interpretation requiring a bond for back rent, and the trial judge in this case indicated his inclination to so construe it. Should this Court, in view of the availability of protective devices rationally related and narrowly tailored to protection of the landlord from rents lost because of the appeal, declare the present §52-542 unconstitutional, it is possible that on remand the new statute may be applied or the present statute construed to require a bond for alleged back rent. In view of the foregoing, the constitutionality of such a bond as a prerequisite to appeal is properly before the Court, and, Tenants respectfully suggest, the resolution of that issue is essential to a disposition of the case.

Conclusion

For the reasons above stated, it is respectfully submitted that the judgment of the Appellate Division of the Connecticut Circuit Court should be reversed, and the case remanded with directions to reinstate appellants' appeal.

Respectfully submitted,

JOSEPH M. SHORTALL
JOANNE S. FAULKNER
FRANCIS X. DINEEN

Attorneys for Appellants

New Haven Legal Assistance Association, Inc.
169 Church Street
New Haven, Connecticut 06510

July 15, 1969

TABLE I

CASE	DATE FILED	JUDGMENT	DECISION OF APPELLATE DIVISION	ENTRY OF JUDGMENT TO DECISION OF APPELLATE DIVISION
Cianciolo v. Plano 1 Conn. Cir. 206, 187 A.2d 611	March 1961		February 1962	
Macha v. Eastern Conn. Training School 1 Conn. Cir. 469, 187 A.2d 638	March 1961		October 1962	
Fortuna, Inc. v. Lyons 1 Conn. Cir. 257, 182 A.2d 921	April 1961		May 1962	
Newton Co. v. Kardys 1 Conn. Cir. 97, 174 A.2d 548	August 1961		October 1961	
Pollack v. Ro-An, Inc. 1 Conn. Cir. 17[illegible], 180 A.2d 293	November 1961		December, 1961	34 days
Sun Oil Co. V. Keane 2 Conn. Cir. 574, 203 A.2d 88	June 1963		March 1964	
Pander v. French 3 Conn. Cir. 561, 221 A.2d 274	October 1965	December 1965	March 29, 1966	88 days

TABLE I (Cont'd)

CASE	DATE FILED	JUDGMENT	DECISION OF APPELLATE DIVISION	ENTRY OF JUDGMENT TO DECISION OF APPELLATE DIVISION
United Illuminating Corp. v. Syntex Rubber Corporation 4 Conn. Cir. 303, 231 A.2d 89	January 1966		September 1966	
Housing Authority v. Simmons 5 Conn. Cir. 287, 250 A.2d 527	July 19, 1967	January 16,1968	March 1, 1968	43 days
Conn. Betterment Corp. v. Ponton 5 Conn. Cir. 265, 250 A.2d 340	January 1968	February 27, 1968	May 1968	93 days
Housing Authority v. Jones 5 Conn. Cir. 350, 252 A.2d 465	April 1968	August 1968	December 1968	117 days
Messina v. Coburn CV6-688-27007	August 1968	August 21, 1968	December 1968	103 days
			Average	80 days

CIRCUIT COURT

40074	CASE NAME (Omit if same as Judgment Creditor(s) vs. Judgment Debtor(s))	CIRCUIT NO	HELD AT (Town)
NAME(S) OF JUDGMENT CREDITOR(S)	Montlick vs Bridges, etal	6	New Haven

T OF DAMAGES	AMOUNT OF COSTS	TOTAL DAMAGES AND COSTS	DATE OF JUDGMENT	AMOUNT OF WEEKLY PAYMENTS
			NAME(S) OF JUDGMENT DEBTOR(S)	

☐ ATTORNEY FOR PLAINTIFF(S) ☐ PLAINTIFF(S)

Bond ordered in The amount of $700.00

Stapleton, J.

.69

☐ ATTORNEY FOR ~~DEFENDANT~~(S) ☐ ~~DEFENDANT(S)~~

Schwartz, Clerk

MAY 14 REC'D

NOTICE TO JUDGMENT DEBTOR(S)

1. The above named Judgment Creditor(s) recovered judgment against the above named Judgment Debtor(s) for Damages and Costs as shown above.
2. An order was entered for Weekly Payments in the amount shown above, beginning one week from the above Date of Judgment.
3. *If Weekly Payments are not made in accordance with the order of the court, an execution may be issued against your wages or property.*
4. *Do not make payment to the clerk of the court.*
5. *Make payment to Plaintiff or Plaintiff's Attorney.*

Assistant Clerk of said court _____

EXHIBIT A

SUPREME COURT, U. S.

OFFICE OF THE CLERK

AUG 18 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., ET UX,

Appellants,

v.

WEST HAVEN HOUSING AUTHORITY,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE STATE OF CONNECTICUT, AMICUS CURIÆ IN SUPPORT OF APPELLEE, WITH WHOM THE LISTED STATES AND TERRITORY HAVE JOINED HEREIN AS AMICI CURIÆ

STATE OF CONNECTICUT
ROBERT K. KILLIAN
Attorney General
F. MICHAEL AHERN
Assistant Attorney General
ROBERT L. HIRTLE, JR.
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

STATE OF ARKANSAS
Joe Purcell, Attorney General

STATE OF COLORADO
Duke W. Dunbar, Attorney General

STATE OF INDIANA
Theodore L. Sendak, Attorney General

STATE OF KANSAS
Kent Frizzell, Attorney General

STATE OF LOUISIANA
Jack P. F. Gremillion, Attorney General

STATE OF MAINE
James S. Erwin, Attorney General

STATE OF MISSISSIPPI
A. F. Summer, Attorney General

STATE OF NORTH CAROLINA
Robert Morgan, Attorney General

STATE OF OHIO
Paul W. Brown, Attorney General

STATE OF TENNESSEE
George F. McCanless, Attorney General

STATE OF UTAH
Vernon B. Romney, Attorney General

STATE OF WYOMING
James E. Barrett, Attorney General

TERRITORY OF
THE VIRGIN ISLANDS
Peter J. O'Dea, Attorney General

INDEX

	Page
Interest of Amicus Curiae	1
Statement of the Case	2
Question Presented	2
Statute in Question	4
Summary of Argument	4
Argument	5
I. The surety bond requirement of Section 52-542, Connecticut General Statutes, is for the purpose of protecting a property owner from irreparable loss during the pendency of an appeal.	5
II. The surety bond requirement of Section 52-542, Connecticut General Statutes, is constitutional as applied in the case of an indigent tenant.	9
III. This case does not present a federal question.	12
Conclusion	13

TABLE OF AUTHORITIES CITED

Statutes	*Page*
Sec. 17-69, Conn. Gen. Stat.	7
Sec. 48-11, Conn. Gen. Stat.	7
Sec. 52-185, Conn. Gen. Stat.	7
Sec. 52-187, Conn. Gen. Stat.	7
Sec. 52-532, Conn. Gen. Stat.	6
Sec. 52-534, Conn. Gen. Stat.	6
Sec. 52-542, Conn. Gen. Stat.	4
Sec. 53-36a, Conn. Gen. Stat.	7
Connecticut Public Acts 1806	5
Art. First, Sec. 10, Constitution of Connecticut (1965)	8
Art. First, Sec. 11, Constitution of Connecticut (1965)	8
Art. Third, Sec. 2, Constitution of Connecticut (1965)	1
11 Geo. 2, c. 19 (1737)	5
Public Act No. 509 § 4 (1961 Session Conn. Gen. Ass.)	10
Statutes of Connecticut 1808	5
28 U.S.C. § 1446(d)	7
29 U.S.C. § 107	7
31 U.S.C. § 518	7
Fifth Amendment, U. S. Constitution	8
Fourteenth Amendment, U. S. Constitution	8

Other Authorities — *Page*

16 Am. Jur. 2d, *Constitutional Law*, § 535 8

Berger, *Land Ownership and Use* 5

4A C.J.S., *Appeal and Error*, § 502(b) 9

16A C.J.S., *Constitutional Law*, § 559 8

52 C.J.S., *Landlord and Tenant*, § 784(a) 10

Friedman, *"Public Housing and The Poor: An Overview"*, 54 Cal. L. Rev. 642 13

2 McAdam, *Landlord and Tenant*, (54th Ed.) § 269 5

Schoshinski: *"Remedies of the Indigent Tenant: Proposal For Change"*, 54 Geo. L. J. 519 13

2 Tiffany, *Landlord and Tenant*, (1912 Ed.) § 284 10

76 Yal. L. J. 545, *"The Indigent's Right to Counsel In Civil Cases"* 13

Cases — *Page*

Alpert v. *Peloquin*, 96 Conn. 626 6

Bennett v. *United Lumber & Supply Co.*, 110 Conn. 536 9

Booher v. *Lowe*, 79 Ohio App. 490 11

Bronson v. *Mechanics Bank*, 83 Conn. 128 9

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 8

Dooley v. *Town Plan & Zoning Commission*, 151 Conn. 304 8

Griffen v. *Illinois*, 351 U.S. 12 10

Harper v. *Virginia Board of Elections*, 383 U.S. 663 11

Higgins v. *Parker*, 48 Ill. 445 11

Hink v. *Bowlsby*, 199 Or. 238 11

Housing Authority v. *Jones*, 5 Conn. Cir. Ct. 350 11

Jensen v. *Nationwide Mutual Ins. Co.*, 147 Conn. 722 11

Jones v. *Union Guano Co.*, 264 U.S. 171 8

Kennedy v. *Walker*, 135 Conn. 262 9

Lane v. *Brown*, 372 U.S. 477 10

Lochner v. *New York*, 198 U.S. 45 11

Palmer v. *Des Reis*, 135 Conn. 388 10

Palmer v. *Des Reis*, 136 Conn. 627 10

Pollack v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173 10

Ricci v. *Bove's Estate*, 116 Vt. 335 11

Smith v. *Bennett*, 365 U.S. 708 10

State v. *Pallotti*, 119 Conn. 70 11

Thompson v. *Coe*, 96 Conn. 644 6

Waters-Pierce Oil Co. v. *State*, 107 Tex. 1 11

Williams v. *Shaffer*, 385 U.S. 1037 11

Winestine v. *Rose Cloak & Suit Co.*, 93 Conn. 633 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., ET UX,

Appellants,

v.

WEST HAVEN HOUSING AUTHORITY,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE STATE OF CONNECTICUT, AMICUS CURIÆ, IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIÆ

This case involves the constitutionality of the surety bond requirement of Section 52-542 of the Connecticut General Statutes.

The General Assembly of the State of Connecticut adjourned by law on June 4, 1969 so that legislative redress is unavailable until it convenes in regular session on January 6, 1971.

> See: Constitution of Connecticut, Article Third, Section 2.

Because of the adverse effect upon civil process if this appeal is sustained, this brief is submitted in support of appellee seeking a dismissal of this appeal and the affirmance of the

decision of the Appellate Division of the Circuit Court of the State of Connecticut.

This brief of amici curiae is filed pursuant to Rule 42(4) of the United States Supreme Court on behalf of the State of Connecticut and the listed States and Territory which have substantially similar statutes and through their Attorneys General as shown below have joined Connecticut on this brief and appear as amici of the Court.

QUESTION PRESENTED

Does Section 52-542 of the Connecticut General Statutes, providing for a bond with surety on an appeal in a summary process action, violate the Equal Protection Clause of the United States Constitution?

STATEMENT OF THE CASE

The appellants entered into possession of the leased premises on November 1, 1966, under a written lease for a term of one month renewable for successive terms of one month each at a rental of $72 per month. On July 12, 1967 the appellee gave the appellants statutory notice to quit possession on or before July 18, 1967 for failure to pay the rent due for the months of May, June, and July 1967.

The appellants failed to quit possession and on July 19, 1967 the appellee filed a statutory summary process action for non-payment of rent. After a trial on the merits the Circuit Court, on January 16, 1968, entered a judgment of possession in favor of the appellee.

On January 18, 1968, appellants filed an appeal from the judgment of the Circuit Court with the Appellate Division of said Court and annexed thereto a motion to waive the surety bond required by Section 52-542 of the Connecticut General Statutes on the ground of alleged indigency.

The said motion to waive the surety bond on appeal was denied, the court finding that the appeal was not taken in good faith, but rather for the purposes of delay and obstruction. This decision was filed on January 19, 1968.

On January 24, 1968 the appellants filed a motion for review with the Appellate Division of the Circuit Court. On March 1, 1968 the Appellate Division denied the motion to review and dismissed the appeal.

On March 11, 1968, the appellants had filed a Petition for Certification in the Supreme Court of Connecticut for a review of the judgment of the Appellate Division of the Circuit Court dated March 1, 1968. On June 25, 1968 the Supreme Court of Connecticut entered an order denying certification.

On March 15, 1968 the appellee moved the Appellate Division of the Circuit Court to terminate the stay of execution of the judgment of possession entered by the trial court. This motion was granted on April 11, 1968. No appeal therefrom has been taken by the appellants.

To delay their eviction under the Circuit Court order of April 11, 1969, the appellants filed an injunctive action in the United States District Court for the District of Connecticut on April 19, 1968. On May 2, 1968, the District Court in a lengthy decision dismissed the federal complaint and appellants promptly appealed to the United States Court of Appeals (Second Circuit) on May 3, 1968. On July 10, 1968, the United States Court of Appeals (Second Circuit) dismissed appellants' federal complaint as moot.

The appellees obtained execution on the Circuit Court judgment of possession on July 26, 1968.

Notice of appeal to the Supreme Court of the United States was filed on June 27, 1968. A motion to stay enforcement of

the judgment of eviction was denied by Mr. Justice Harlan on July 16, 1968.

This Supreme Court noted probable jurisdiction on April 7, 1969.

STATUTE IN QUESTION

Section 52-542 of the Connecticut General Statutes, Revision of 1958, Revised to 1968, provides:

> **"Bond on appeal; stay of execution.**
>
> When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-543 to 52-548, inclusive."

SUMMARY OF ARGUMENT

The surety bond requirement of Section 52-542 of the Connecticut General Statutes is constitutional on its face. When an indigent applies to the trial court for a waiver of this statutory requirement the court, assuming it has the equitable power to

waive the statute or impose substitute requirements, must first find that the appellant is acting in good faith and not for the purpose of delay. The refusal of the trial judge to permit the appellants in this case to pay rental into escrow during the pendency of the appeal because said appeal was taken in bad faith and for the purpose of delay did not result in any discrimination against the appellants based solely upon their poverty.

ARGUMENT

I. THE SURETY BOND REQUIREMENT OF SECTION 52-542, CONNECTICUT GENERAL STATUTES, IS FOR THE PURPOSE OF PROTECTING A PROPERTY OWNER FROM IRREPARABLE LOSS DURING THE PENDENCY OF AN APPEAL.

The summary process statute, of which Sec. 52-542, Conn. Gen. Stat., is a part, originated in 1806 in Connecticut and was an attempt by the General Assembly to provide a property owner with means of recovering possession of real property against an irresponsible and dishonest resisting tenant other than the lengthy and expensive common law action of ejectment.

> See: Connecticut Public Acts 1806, p. 729, Statutes of Connecticut 1808, p. 450.

The Connecticut statute was based on an English act which provided a summary manner for obtaining possession of a leasehold against a tenant who was either unable or unwilling to pay rent.

> 11 Geo. 2, c. 19 (1737)
>
> See: 2 McAdam, *Landlord and Tenant* (5th Ed.) § 269, p. 1135; and Berger, *Land Ownership and Use*, p. 360.

The summary process action is limited to those situations where there is a lease which has terminated either by time or

nonpayment of rent, or where there is occupation without right or privilege.

> Section 52-532, Connecticut General Statutes, Revision of 1958, Revised to 1968.

The case at hand was commenced because of nonpayment of rent for a period of three months.

The only defenses available to a tenant against a summary process action are to establish title which accrued after the lease in suit was given or to establish an equitable defense justifying late payment, nonpayment or withholding of rent.

> Section 52-534, Conn. Gen. Stat., Rev. of 1958, Rev. to 1968; *Wisentine* v. [illegible] 93 Conn. 633, 638; *Alpert* v. *Pelaquin*, 98 [illegible]; *Thompson* v. *Coe*, 96 Conn. 644, [illegible]

The record in this case establishes [illegible] appellants advanced seven special defenses before the [illegible] court. All of the defenses were procedural and none set [illegible] any equitable defense to the summary process action. Indeed, if the appellants' first special defense before the trial court is read with their trial brief it shows that the appellants were angry with the appellee because of the institution of a previous summary process action which was not prosecuted to effect. Accordingly, they arbitrarily withheld their rent from the appellee for three months. The trial court correctly entered a judgment for possession of the premises for nonpayment of rent. The trial court also made the following *dicta* in its memorandum of decision dated January 16, 1968.

> "The record in this case clearly shows what can happen to a summary proceeding where the process is abused by dilatory tactics, defenses interposed to delay or obstruct the proceeding, and every effort made to delay a trial of the case on the merits."

In the same memorandum of decision the trial court found that:

> "The evidence further establishes that rent in the amount of $72.00 per month in accordance with the terms of the lease has not been paid for the months of May, June and July of 1967. The evidence also establishes that no rent has been paid for any of the succeeding months of August, September, October, November and December 1967."

The appellee is a public housing authority existing under both state and federal law. Its operations are subject to control by the United States Department of Housing and Urban Development. Financing is by public bond issues and grant from the Department of Housing and Urban Development. The income from tenants is used to meet the public bond issues.

Against the above background the trial court, in January of 1968, had to decide the motion to waive the surety bond on appeal.

The requirement of posting a bond as condition upon the right of obtaining judicial relief is generally found in both federal and state courts.

> See: 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 107 (injunction in labor disputes); 28 U.S.C. 1446(d) (removal of cases);
>
> Also: Sec. 53-36a, Conn. Gen. Stat., (injunction to prevent discrimination in public accommodations); Sec. 52-185, Conn. Gen. Stat., (bond for prosecution of civil actions); Sec. 52-187, Conn. Gen. Stat., (actions against municipalities); Sec. 48-11, Conn. Gen. Stat., (eminent domain); Sec. 17-69, Conn. Gen. Stat., (juvenile court appeals).

It has long been settled that the Fourteenth Amendment does not prevent a state from prescribing reasonable and appropriate conditions precedent to the seeking of judicial relief through legal proceedings of a specified kind of class so long as the basis of the distinction is real and the conditions imposed have a reasonable relationship to a legitimate object.

> *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 542; *Jones* v. *Union Guano Co.*, 264 U.S. 171, 181;
>
> See also: 16 Am. Jur. 2d, *Constitutional Law*, § 535; 16A C.J.S., *Constitutional Law*, § 559.

Applying the above standard to the surety bond requirement of Sec. 52-542, Conn. Gen. Stat., it is clear that said statute prescribes reasonable and appropriate conditions with a legitimate object in mind. If an individual is to be allowed by statute to possess another's real property during the course of litigation, surely the property owner is entitled to the statutory protection of security for lost rent and other injuries which might be irreparable if no security is provided. To fail to do so would constitute a judicial deprivation or taking of property without due process of law in violation of the Fourteenth Amendment and without compensation in violation of the Fifth Amendment. In addition to violating the United States Constitution, the corresponding sections of the Constitution of Connecticut (1965) found at Article First, Sections 10 and 11, would be violated.

> See: *Dooley* v. *Town Plan & Zoning Commission*, 151 Conn. 304, 314.

Sec. 52-542, Conn. Gen. Stat., having been enacted with the legitimate object in mind of providing due process of law to a property owner during the pendency of an appeal by a tenant, and said statute having prescribed reasonable and appropriate conditions in the requirement of a surety bond, it is clear that the statute is constitutional on its face. The only remaining

question is whether said statute is unconstitutional when applied in the case of an indigent tenant.

II. THE SURETY BOND REQUIREMENT OF SECTION 52-542, CONNECTICUT GENERAL STATUTES, IS CONSTITUTIONAL AS APPLIED IN THE CASE OF AN INDIGENT TENANT.

There is considerable dicta in the decision of the Appellate Division of the Circuit Court below which would indicate that the filing of a surety bond is essential to the validity of an appeal in a summary process action. In its opinion of March 1, 1968 said court stated:

> ". . . The right to an appeal is not a constitutional one, nor one based upon principles of natural justice. It is but a statutory privilege which an aggrieved party has the right to avail himself of only when he has strictly complied with the provisions of the statutes and rules upon which the privilege is granted. *Bronson* v. *Mechanics Bank,* 83 Conn. 128, 133; see *Bennett* v. *United Lumber and Supply Co.,* 110 Conn. 536, 538; 'An appeal in this state is a statutory privilege accorded only if the conditions fixed by the statutes and rules of court for taking and prosecuting it are complied with.' *Kennedy* v. *Walker,* 135 Conn. 262, 266. 'Under its general authority to regulate appellate procedure the legislature has the power to require the giving of a bond or undertaking as a condition precedent to the right to appeal or sue or a writ of error, unless such power is clearly excluded by the constitution. Such statutes do not violate constitutional provisions granting the right of appeal, as they do not restrict or deny the right, but merely regulate the manner of exercising it, . . .' 4A C.J.S., *Appeal and Error,* § 502(b), p. 208. 'The statutes relating to summary process actions almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution

of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession.' 2 Tiffany, *Landlord and Tenant* (1912 Ed.) § 284, p. 1805; see 52 C.J.S., *Landlord and Tenant*, § 784(a); *Pollack* v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173, 174. 'Thus, it is left to the legislature to provide the manner of taking an appeal and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party.'

'Section 52-542 of the General Statutes, as amended by Public Act 509, § 4 (1961), provides that 'when any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue . . .' A sufficient bond with surety is essential to a valid appeal; see *Palmer* v. *Des Reis*, 136 Conn. 627, 630; and is solely for the protection of the appellee. *Palmer* v. *Des Reis*, 135 Conn. 388, 389.' "

There is no question that the legislature intended the surety bond requirement in Sec. 52-542, Conn. Gen. Stat., to apply to indigents as well as non-indigents. Nor is there any statutory provision for the waiver of the surety bond requirement in an appeal in a summary process action. The appellants contend that this requirement effects a classification based on poverty or affluence in violation of equal protection of the laws and due process.

While this Supreme Court has held that the right of freedom from imprisonment upon an unjust conviction cannot be conditioned upon the payment of a fee, *Griffen* v. *Illinois*, 351 U.S. 12, *Smith* v. *Bennett*, 365 U.S. 708, *Lane* v. *Brown*, 372 U.S. 477; it has not yet gone so far as to hold that no state services may be conditioned upon the payment of a fee as long as the fee is

reasonably considered by the legislature to be required for legitimate state purposes. See: *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668. The requirement of posting a bond for the protection of an adverse party and to prevent frivolous appeals is even further removed from the above-cited prohibitions than the payment of a fee to the state.

While it may be desirable in our society for the General Assembly of Connecticut to provide an *in forma pauperis* procedure in civil matters to indigents, it does not violate the federal Constitution to fail to do so. Nor does this Supreme Court sit to enact social legislation by judicial *fiat.*

> See: *Lochner* v. *New York,* 198 U.S. 45, 75; *Harper* v. *Virginia Board of Elections,* supra at 669; *Williams* v. *Shaffer,* 385 U.S. 1037, 1041.

III. THIS CASE DOES NOT PRESENT A FEDERAL QUESTION.

Having concluded that the surety bond requirement is essential and that there is no statutory provision for waiver, it does not necessarily follow that an appeal not accompanied by a surety bond is void.

> *State* v. *Pallotti,* 119 Conn. 70, 74; *Housing Authority* v. *Jones,* 5 Conn. Cir. Ct. 350, 354.

For one thing, the requirement of a surety bond may be waived by the appellee, *Jensen* v. *Nationwide Mutual Ins. Co.,* 147 Conn. 733, 723; for another, the court may set such conditions as will be adequate for the protection of the appellee.

> *Hink* v. *Bowlsby,* 199 Or. 238, 241; *Ricci* v. *Bove's Executor,* 116 Vt. 335, 339; *Waters-Pierce Oil Co.* v. *State,* 107 Tex. 1, 6; *Higgins* v. *Parker,* 48 Ill. 445, 448; *Booher* v. *Lowe,* 79 Ohio App. 490, 492.

The appellees foreclosed any waiver of the surety bond requirement by filing its objections to defendants' motion to waive surety bond on appeal dated January 19, 1968.

The appellants precluded any equitable consideration of their motion to waive surety bond on appeal by their use of dilatory tactics for the purpose of delay as found by the trial court. (Record Appendix, p. 23).

Whether the trial court properly exercised its discretion in ruling on the Motion to Waive Surety Bond on Appeal is really the only question on this appeal. As said exercise of discretion does not raise a federal question, this appeal ought to be dismissed for lack of jurisdiction.

It is undisputed that the trial court reached the following findings from the record:

> "1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due;
>
> 2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding;
>
> 3) the instant motion is another effort to avoid the clear obligation required by Section 52-542 of the Connecticut General Statutes requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents that may accrue;
>
> 4) it clearly appears to this court, having tried this case, that this appeal is being taken for the purpose of delay."
>
> Memorandum of Decision on Motion to Waive Surety Bond on Appeal - January 19, 1968 (Record Appendix, p. 23).

In view of these findings, the trial court can not be said

to have abused its discretion in denying the Motion to Waive Surety Bond on Appeal.

CONCLUSION

The issue of whether an indigent should be allowed to appeal in a summary process action without the filing of a surety bond is a legitimate social issue. There undoubtedly is a trend toward allowing greater latitude toward proceeding *in forma pauperis* in civil actions. However, these accomplishments have been achieved by Congressional legislation with regard to federal civil actions and by legislation in some twenty-three of the states.

> See: *"The Indigent's Right to Counsel In Civil Cases"*, 76 Yale L. J. 545, 559.

It may be that at some future time the Connecticut General Assembly will join other states in providing *in forma pauperis* in civil proceedings but, to date, it has not done so.

Even if this Supreme Court felt that it had jurisdiction to require a waiver of the surety bond requirement, it would be hard put to justify such an application under the facts of the instant case. The record is devoid of any of the slum problems which are usually associated with indigent tenants and advocated in justification of nonpayment of rent.

> See: Schoshinski, *"Remedies of The Indigent Tenant: Proposal for Change"*, 54 Geo. L. J. 519.

Nor does the record reveal that the appellee was using the summary process action to punish the appellants for failure to conform to the mores of the so-called white middle class America.

> See: Friedman, *"Public Housing and The Poor: An Overview"*, 54 Cal. L. Rev. 642, at 659 *"Terms and Evictions"*.

This case is a simple case of nonpayment of rent without justification.

This appeal should be dismissed and the decision of the Appellate Division of the Connecticut Circuit Court should be affirmed.

Respectfully submitted,

STATE OF CONNECTICUT

By: ROBERT K. KILLIAN
Attorney General

F. MICHAEL AHERN
Assistant Attorney General

ROBERT L. HIRTLE, JR.
Assistant Attorney General

STATE OF ARKANSAS
Joe Purcell, Attorney General

STATE OF COLORADO
Duke W. Dunbar, Attorney General

STATE OF INDIANA
Theodore L. Sendak, Attorney General

STATE OF KANSAS
Kent Frizzell, Attorney General

STATE OF LOUISIANA
Jack P. F. Gremillion, Attorney General

STATE OF MAINE
James S. Erwin, Attorney General

STATE OF MISSISSIPPI
A. F. Summer, Attorney General

STATE OF NORTH CAROLINA
Robert Morgan, Attorney General

STATE OF OHIO
Paul W. Brown, Attorney General

STATE OF TENNESSEE
George F. McCanless, Attorney General

STATE OF UTAH
Vernon B. Romney, Attorney General

STATE OF WYOMING
James E. Barrett, Attorney General

TERRITORY OF
THE VIRGIN ISLANDS
Peter J. O'Dea, Attorney General

LIBRARY
JUN 19 1969
SUPREME COURT, U.S.

4

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,
Appellants,

vs.

THE HOUSING AUTHORITY OF
WEST HAVEN, CONNECTICUT,
Appellee.

On Appeal From The Appellate Division Of
The Connecticut Circuit Court

MOTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

ALLAN ASHMAN,
1155 E. 60th Street,
Chicago, Illinois 60637,
Attorney for Amicus Curiae
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION.

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-2929

INDEX

	PAGE
Motion for Leave to File a Brief Amicus Curiae	1
Interest of Amicus Curiae	4
Opinion Below	5
Jurisdiction	5
Statutory Provision Involved	5
Question Presented	6
Statement of the Case	6
Summary of Argument	6
Argument:	
I. The Surety Bond Requirement Of Sec. 52-542 Of Connecticut General Statutes Effects An Arbitrary And Invidious Discrimination Among Citizens On The Basis Of Wealth In Violation Of The Constitution Of The United States In That Its Practical Effect Is To Deny Indigent Citizens The Right To Appeal In Cases Wherein A Wealthy Person Would Be Able To Appeal	7
A. The Equal Protection Clause Requires That If A State Provides An Appeal To Some It Cannot Deny It To Others Because Of Their Poverty	7
B. Persons Should Not Be Denied Access To State Courts Because Of Their Poverty	10
II. The Equal Protection Clause Is Not Limited In Its Application To Criminal Cases	14

III. The Right Of An Indigent Tenant To Remain In Possession Of His Shelter And Appeal A Judgment Of Eviction Without Posting A Surety Bond For Rent Is Crucial To The Proper Disposition Of This Case 17

A. An Indigent Tenant Should Not Have To Surrender Possession Of His Shelter In Order To Appeal A Judgment Of Eviction 17

B. Appellate Review Is Vital To The Vindication Of An Individual Tenant's Rights And To The Development Of A Just And Equitable Body Of Landlord-Tenant Law 18

C. The Existence In Other States Of Surety Bond Requirements That Serve As Effective Preconditions To Appeal In Actions Of Summary Process Makes This An Issue Of National Concern 20

Conclusion 22

Appendices:

A. State Bond Requirements Imposed On Tenants Who Wish To Remain In Possession Of Their Shelter While Appealing A Judgment Of Eviction 1a

B. Questionnaire Sent To All Civil Legal Aid Offices And Selected Responses Thereto 8a

Table Of Authorities

Cases:

Barber v. Gladden, 298 P. 2d 986 (Ore. 1956) 16
Barbier v. Connolly, 113 U.S. 27 (1885) 15
Boyd v. United States, 116 U.S. 616 (1886) 18
Burns v. Ohio, 360 U.S. 252 (1959) 15
Douglas v. California, 372 U.S. 353 (1963) 8, 9
DuPont v. Family Court for New Castle County, 153 A. 2d 189 (Del. 1959) 16

Griffin v. Illinois, 351 U.S. 12 (1956) 8, 9, 14
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 10, 15
McKane v. Durston, 153 U.S. 684 (1894) 7
NAACP v. Button, 371 U.S. 415 (1963) 19
Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938) 11
Reynolds v. Smith, ... U.S. ....., 89 S. Ct. 1322 (1969) 10
Sanks v. Sanks, CCH Poverty L. Rep. ¶ 9270, at 10,514 (Ga. Civ. Ct., Fulton County, Oct. 2, 1968) .. 13
Shapiro v. Connecticut, ... U.S. ....., 89 S. Ct. 1322 (1969) 10
Smith v. Bennett, 365 U.S. 708 (1961) 15
Washinton v. Legrant, ... U.S. ....., 89 S. Ct. 1322 (1969) 10
Williams v. Shaffer, 385 U.S. 1037 (1967) 16, 17

Constitutional Provisions:

United States Constitution
Fourteenth Amendment 6, 8, 10, 14, 15, 16

Statutes:

Ala. Code tit. 7, Sec. 985 12
Ariz. Rev. Stat. Sec. 12-1179 12
Conn. Gen. Stat. Ann. Sec. 52-263 8
Conn. Gen. Stat. Ann. Sec. 52-542 ..... 6, 7
Ga. Code Ann. Sec. 61-303, 305 12
N.C. Gen. Stat. Sec. 42-34 12
W. Va. Code Sec. 60-15-2 12

Other Authorities:

Comment, *Tenant Unions: Collective Bargaining and The Low Income Tenant*, 77 Yale L. J. 1368 (1968) 19
Developments in the Law, *Equal Protection*, 82 Harv. L. Rev. 1065 (1969) 8
Note, *Indigent's Right to Counsel in Civil Cases*, 76 Yale L. J. 545 (1967) 10

OEO-CCH Poverty L. Rep. 7, 13
Report Of The National Advisory Commission On Civil Disorders (paperback ed. 1968) 19
Schoshinski, *Remedies of the Indigent Tenant: Proposal For Change,* 54 Geo. L. J. 519 (1966) 17, 19
Shier, *Protecting the Interests of the Indigent Tenant: Two Approaches,* 54 Calif. L. Rev. 670 (1966) 18
Shoor, Slums And Social Insecurity (1964) 18
Tenant Rent Strikes, 3 Colum. J. L. & Soc. Prob. 1 (1967) 19
P. Wald, Law And Poverty: 1965 Report To The National Conference On Law And Poverty (1965) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1232

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

VS.

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

On Appeal From The Appellate Division Of The Connecticut Circuit Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE*

The National Legal Aid and Defender Association respectfully moves for leave to file a brief *amicus curiae* in this case in support of the appellants.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation whose primary purpose is to assist in providing more and better legal services for the poor. Its members in-

* Consent has been granted by Appellants. Appellee denied Amicus' request.

clude the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The NLADA also has 1600 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

The NLADA and its members believe that each citizen, rich or poor, is entitled to equal justice under law. To deny justice to any individual is to deny him one of the most critical rights of citizenship. We agree with the statement of former Chief Justice Charles Evans Hughes that "There is no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty."

More people probably are affected directly by the administration and construction of the kind of summary process statute at issue than perhaps by any other law. Every day throughout the country, individuals are made parties to eviction proceedings upon which hinge their most prized possession and the most important aspect of their daily lives—their homes and shelter for their children. The NLADA feels that it is of the utmost importance, and a public concern of the highest magnitude, that the content and administration of summary process laws that so vitally and immediately affect the lives of so many people be fair and equitable.

The NLADA moves for leave to file this brief because we believe that it is not merely a vague "public policy" that demands that an individual's meaningful right to appeal in actions of summary process be protected by this Court but that it is the inescapable command of the United States Constitution. We contend that the harm resulting to appellants and to our entire system of jus-

tice from the practice of Connecticut and other states employing a system of appellate practice that in its practical application denies poor people the right to appeal in actions of summary process warrants the fullest possible exposition of the serious constitutional issues involved.

It is our hope that our brief will aid the Court by emphasizing this aspect of the litigation and also by attempting to cast light on the issues from a national perspective. The brief includes questionnaires circulated by the NLADA among its civil member offices throughout the country. We believe that the responses to this questionnaire include material supplemental to the appellants' brief that should be useful to the Court in its consideration of this case.

In view of the direct importance of this case to legal aid attorneys serving the poor throughout the country, and to the poor themselves, the executive committee of the NLADA has authorized and instructed the NLADA staff to prepare and file an amicus brief in this case if so permitted by the Court.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* be granted.

/s/ ALLAN ASHMAN,
1155 E. 60th Street,
Chicago, Illinois 60637,

Attorney for Amicus Curiae
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1232

RECTOR SIMMONS, JR. and ROSE SIMMONS,
Appellants,

vs.

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,
Appellee.

On Appeal From The Appellate Division Of The Connecticut Circuit Court

---

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of the *amicus curiae* is set forth.

OPINION BELOW

The opinion of the Appellate Division of the Connecticut Circuit Court was unreported. It is set out in the appendix to Appellants' Jurisdictional Statement at p. 1a. The Connecticut Supreme Court of Errors on June 25, 1968 denied petition by appellants for certification for appeal from the Appellate Division of the Circuit Court, 243 A. 2d 83.

JURISDICTION

The jurisdiction of this Court to review by appeal the judgment of the Appellate Division of the Connecticut Circuit Court is conferred by 28 U.S.C. 1257 (2). Probable jurisdiction was noted on April 7, 1969.

STATUTORY PROVISION INVOLVED.

Sec. 52-542 of the General Statutes of Connecticut (Gen. Statutes of Conn., Vol. IX, 1965 Supp., p. 135):

> *Sec. 52-542. Bond on appeal; stay of execution*
>
> When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken

within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-542 to 52-548, inclusive.

QUESTION PRESENTED.

Does the surety bond requirement of Sec. 52-542 of the Connecticut General Statutes effect an arbitrary and invidious discrimination among citizens on the basis of wealth in violaton of the Equal Protecton Clause of the United States Constitution?

STATEMENT OF THE CASE

The NLADA adopts Appellants' Statement.

SUMMARY OF ARGUMENT

An indigent tenant should not be required to post a surety bond that he cannot secure or to surrender possession of his shelter in order to appeal a judgment of eviction. The surety bond requirement of Sec. 52-542 of the Connecticut General Statutes violates the Equal Protection Clause of the Constitution in that its practical effect is to deny indigent citizens the right to appeal in cases wherein a wealthy person would be able to appeal. The refusal of the trial judge in the case before this Court to permit appellants to post a use and occupancy bond clearly resulted in a discrimination against the appellants based solely upon their poverty.

ARGUMENT

I.

THE SURETY BOND REQUIREMENT OF SEC. 52-542 OF CONNECTICUT GENERAL STATUTES EFFECTS AN ARBITRARY AND INVIDIOUS DISCRIMINATION AMONG CITIZENS ON THE BASIS OF WEALTH IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES IN THAT ITS PRACTICAL EFFECT IS TO DENY INDIGENT CITIZENS THE RIGHT TO APPEAL IN CASES WHEREIN A WEALTHY PERSON WOULD BE ABLE TO APPEAL.

A. The Equal Protection Clause Requires That If A State Provides An Appeal To Some It Cannot Deny It To Others Because Of Their Poverty.

In many states, the right to remain in possession and appeal a judgment of eviction is conditioned upon a tenant's posting an appeal bond. See CCH *Poverty L. Rep.* ¶ 2235. In Connecticut, Section 52-542 of the General Statutes makes the posting of a bond with surety for all rents that may accrue during the pendency of a tenant's appeal a necessary precondition to any appeal by a tenant in an action of summary process. In the case presently before this Court, appellants' appeal from the judgment of eviction was dismissed for want of a surety bond. (R. 39, p. 137) The practical effect of the Connecticut statute is to deny indigent tenants the opportunity for appellate review in actions of summary process.

This Court has declined to find a constitutional right to appeal as such (See e.g. *McKane* v. *Durston*, 153 U.S. 684 (1894), but it has noted that the Equal Protection Clause does require that if a state provides an appeal

to some it cannot deny it to others because of their inability to pay, even where such a denial can be rationally defended. *Douglas* v. *California*, 372 U.S. 353-58 (1963). We believe that the right to take an appeal in an action of summary process is of "fundamental" importance and is deserving of special protection under the Equal Protection Clause. Access to appellate courts in actions of summary process should turn neither upon a person's economic status nor upon his surrendering possession of his shelter.

Even if this Court should continue to hold that Connecticut is not constitutionally compelled to make appellate review available as a matter of right, we contend that once Connecticut did provide for a system of appellate review in actions of summary process (a system ostensibly available to all citizens) it could not do so in a way that operated to deny access to review to appellants solely because of their poverty. See Developments in the Law, "Equal Protection," 82 *Harv. L. Rev.* 1065, 1178 (1969).

Prior to 1961, the proper procedure to obtain a review of alleged errors of law in a landlord's summary process action in Connecticut was by writ of error. See Conn. Gen. Stat. Ann. Sec. 52-263. In 1961, the Connecticut Legislature amended Sec. 52-263 specifically to provide for appellate review in actions of summary process. Pub. Act 509, Sec. 2, (1961). There appears, then, a clear determination on the part of the state of Connecticut to make appellate review available in a landlord's summary process action to all of its citizens as a matter of right.

Just as Illinois in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), made an unjustified distinction between those who were

able to purchase transcripts and those who were not, so, in the case presently before this Court, Connecticut has made an unjustified distinction between those who can appeal in actions of summary process and those who cannot. The specific provision at issue in *Griffin* did not expressly discriminate against indigents as a group. Illinois had not declared that an indigent could not have a transcript. Because the practical effect of the Illinois appellate scheme operated just the same as an express prohibition, however, this Court treated the provision as if the indigent had been specifically excluded. Similarly, in *Douglas* v. *California,* 372 U.S. 353 (1963), this Court concluded that, although California was pursuing the otherwise legitimate objective of providing counsel for an appeal only for non-frivolous claims, it had created a situation in which the well-to-do could always have a lawyer—even for frivolous appeals—whereas the indigent could not.

Connecticut has not declared that an indigent cannot appeal an order of eviction. Neither has it declared that no person with assets under a certain amount would be guaranteed the right to appeal in a landlord's summary process action. However, in requiring a surety bond as a precondition to appeal in a landlord's summary process action, Connecticut has, like Illinois and California, ignored private inequalities of wealth. In *Griffin,* this Court required non-discriminatory treatment with respect to satisfying what it took to be the interest really at stake—that of actually being able to acquire a transcript in order to bring an effective appeal. Here the interest at stake is that of actually being able to secure a surety bond in order to remain in possession and appeal a judgment of eviction.

B. Persons Should Not Be Denied Access To State Courts Because Of Their Poverty.

The National Legal Aid and Defender Association does not mean to imply that Connecticut must equalize the impact on rich and poor alike of all its actions and institutions; however, the establishment by a state of a forum for enforcing claims and vindicating legal rights appears so fundamental that it would seem unthinkable to permit a state to close that system to any person because of his relative poverty. See Note, "Indigent's Right to Counsel in Civil Cases," 76 *Yale L. J.* 545, 550 (1967). Equal justice, perhaps unlike equal privileges on a municipal golf course, is a "defining condition of citizenship." *Id.* 550. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), a $1.50 poll tax was viewed by this Court as treating those unable to pay as second-class citizens. Similarly, when Connecticut requires its citizens to post a surety bond in order to appeal in an action of summary process, the state is treating those who cannot meet this financial requirement as second-class citizens. A state that provides justice through an appellate process cannot condition that grant upon the ability to pay of those who are intended to benefit from it.

Recently, this Court held that a classification of welfare applicants according to whether they lived in a state for one year violated the Equal Protection Clause. See *Shapiro* v. *Connecticut*, *Washington* v. *Legrant*, *Reynolds* v. *Smith*, ... U.S. ....., 89 S. Ct. 1322 (1969), (37 U.S. Law Week 4333). In so holding, this Court noted that since the classification touched upon the fundamental right of interstate movement, its constitutionality must be judged by stricter standards of whether it promotes a "compelling" state interest. *Id.* at 4339. Previously, a

statute was held not to deny equal protection if it could be said to be rationally related to a legitimate governmental objective. See e.g. *Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573, 578 (1938). Even if this Court were to hold that the right to appeal in a landlord's summary process action is not a *fundamental right* so as to require that the constitutionality of the classification be judged against the stricter standard of whether it promotes a compelling state interest, the classification in question must still be judged by whether it is rationally related to a legitimate governmental objective. We contend that not only does the classification fail to promote a compelling state interest but that it is not rationally related to a legitimate governmental objective.

The only legitimate interest Connecticut might have in providing for a surety bond as a precondition to appeal in an action of summary process would be to protect the landlord from loss of rent from an indigent or insolvent tenant in the event the appeal is resolved in the landlord's favor. This interest must, in turn, be balanced against the importance of assuring equal access to the appellate process in a landlord's summary process action. If this Court concludes that the state of Connecticut has a legitimate interest in "saving the landlord harmless" from losses of rent that might occur during the pendency of an appeal, this Court must still weigh the practical effect of the surety bond requirement as a precondition to appeal as opposed to alternative procedures that both permit access to the appellate courts and protect landlords from loss.

There seems to be little question but that the Connecticut statute generally prohibits poor tenants from pursuing rightful appeals. By definition, the poor are un-

able to post such a bond. In the case before this Court, it was estimated that at the rate of $72 per month, the claimed rent (R. 2, p. 6), a bond of at least a few hundred dollars, (approximately three months' rent) would be required to protect the landlord from delays in the appellate process.* Yet the financial affidavit filed with the appellant's motion to waive the bond (R. 32, p. 64) showed that appellants had no liquid assets. No surety company would write such a bond without liquid collateral in the full amount of the bond. (R. 32, p. 63)

There are no available statistics to document the effect of the bond requirement on the number of appeals that are actually pursued in Connecticut in actions of summary process. Analogous figures, however, indicate that probably few summary ejectment actions are appealed in those jurisdictions requiring a surety bond. For example, a Georgia "Tenant Bond" statute provides for a full *hearing* in any action of summary process upon the posting of a bond equal to double the rent to become due in six months. See Ga. Code Ann. §61-303, 305. Recently, a trial court in Fulton County, Georgia, held these statutes unconstitutional and noted that: "The uncontradicted evidence in these proceedings show the defendants are indigent and unable to obtain bonds; this situation takes on increasing importance when considered in the light of the evidence that during the year 1967 more than 19,000

---

* Many states have far more onerous bond requirements than does Connecticut. For example, both West Virginia (W. Va. Code §60-15-2) and North Carolina (N.C. Gen. Stat. §42-34) require a tenant in an action of summary process to post bond in the amount of one year's rent, while Arizona (Ariz. Rev. Stat. §12-1179) and Alabama (Title 7, §995 Code of Alabama) require an appeal bond of double the yearly rent of the premises. For these and other state statutes requiring surety bonds as preconditions to appeal in actions of summary process see Appendix A *infra*.

dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances." *Sanks* v. *Sanks,* CCH *Poverty L. Rep.* ¶ 9270, at 10,514 (Ga. Civ. Ct., Fulton County, Oct. 2, 1968). The inference seems clear that the small number of *defenses* to the dispossessory actions in Fulton County were a direct result of the Georgia statutory provisions requiring the posting of a bond by a tenant as a condition precedent to filing a defense to a dispossessory warrant.

Rather than require an indigent tenant who seeks to appeal a judgment of eviction to post a surety bond that he cannot secure or to surrender possession of his shelter a state, if it wishes, can still protect a landlord from loss of rent from an indigent or insolvent tenant without discouraging or prohibiting rightful appeals. For example, Connecticut could require that an indigent post an appeal bond in the form of a "use and occupancy" bond pending the outcome of an appeal. A tenant seeking review of a judgment of eviction would remain in possession of the premises during the pendency of his appeal and agree to pay into the court all rents to become due, thus protecting the landlord. The landlord by accepting such a bond would in no way prejudice his judgment or claims against the tenant. Upon failure of the tenant to comply with the bond, the landlord would have the right to have the appeal dismissed. A use and occupancy bond would not preclude appeals in actions of summary process because it would not require a large sum of money or other form of liquid collateral that the poor cannot secure. In addition, a use and occupancy bond would offer sufficient and realistic protection to shield any landlord from potential loss.

The refusal of the trial judge in the case before this Court to permit appellants to post a use and occupancy bond (See R. 32, p. 61) clearly resulted in a discrimination against the appellants based solely upon their poverty. It is our contention that the constitutional guarantee of equal protection of the laws is not subject to a construction that allows a man of means to defend his rights in court or to appeal an adverse ruling against him while denying the same opportunity to the indigent. Our courts must be open to all—both rich and poor alike. Equal protection of the laws should not embrace procedures whereby access to the machinery of the courts is made contingent upon an individual posting a bond that he is without means to procure or surrendering possession of his shelter.

II.

THE EQUAL PROTECTION CLAUSE IS NOT LIMITED IN ITS APPLICATION TO CRIMINAL CASES.

In 1956, this Court held that an Illinois appellate scheme, wherein "full direct appellate review" could be had as a practical matter only if the defendant-appellant provided a trial transcript at his own expense, violated the Equal Protection Cause as to an indigent defendant by denying him the appeal that a wealthy litigant could afford. *Griffin* v. *Illinois*, 351 U.S. 12 (1956). The Court declared in *Griffin*: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy a transcript." *Id.* at 19.

The *Griffin* rationale has never been directly applied by this Court to civil litigation. This has caused some

speculation about whether *Griffin* and its progeny embodied a general interpretation of the Equal Protection Clause that applied only to criminal cases. (See, e.g. *Burns* v. *Ohio*, 360 U.S. 252 (1959), which held that Ohio could not constitutionally require indigent defendants to pay filing fees in criminal appeals.) Yet, on several occasions, this Court has indicated that the Equal Protection Clause should not be limited simply to criminal cases. For example, as early as 1885 this Court noted that the Fourteenth Amendment, "... undoubtedly intended ... that all persons ... should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts ..." *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885).

In *Smith* v. *Bennett*, 365 U.S. 708 (1961), the Court found it a denial of Equal Protection to require that indigent prisoners pay a $4.00 filing fee before they could petition for a writ of habeas corpus. This Court rejected the notion that merely because a proceeding is called "civil" the protection of the Fourteenth Amendment is not available to prospective indigent litigants. The Court in *Bennett* refused to "quibble" as to whether a habeas corpus proceeding should be termed a civil or criminal action. *Id.* at 712. In declaring Virginia's poll tax statute, which conditioned the vote in state elections upon the payment of a $1.50 tax, in violation of the Equal Protection Clause, this Court emphasized that "lines drawn on the basis of wealth or poverty, like those of race ... are traditionally disfavored." See *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668 (1966). Stating that "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth

Amendment," this Court concluded in *Harper* that "the affluence of any voter or payment of any fee" constituted such an impermissible line. *Id.* at 665-66.

Mr. Justice Douglas, in dissenting from this Court's denial of certiorari in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967), stated:

> We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. . . . the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. *Id.* at 1039.

Several state supreme courts seem to share Justice Douglas's view. They have held unconstitutional statutory requirements that had the effect of denying poor people the access to appellate review enjoyed by others. The Oregon Supreme Court, for example, has held that in a habeas corpus proceeding—a civil action governed by the procedures that apply in all other civil litigation under the law of Oregon—a statutory requirement of an appeal bond denies equal protection to an indigent appellant, and that as to such a litigant the appeal bond requirement must be waived. *Barber* v. *Gladden*, 298 P. 2d 986 (Ore. 1956).

The Supreme Court of Delaware has recognized a similar principle. It held that a statute governing separate maintenance actions violated the Equal Protection Clause in that it permitted plaintiffs (wives and children) to appeal but denied the right to appeal to defendants (husbands). *DuPont* v. *Family Court for New Castle County*, 153 A. 2d 189 (Del. 1959). The Delaware Court stated: "We do not consider it necessary to labor the

point that the grant of a right to appeal to one litigant with an accompanying failure to make the same grant to the other is in law discrimination and, as such, a violation of both the Federal and State Constitution." *Id.* at 192.

III.

THE RIGHT OF AN INDIGENT TENANT TO REMAIN IN POSSESSION OF HIS SHELTER AND APPEAL A JUDGMENT OF EVICTION WITHOUT POSTING A SURETY BOND FOR RENT IS CRUCIAL TO THE PROPER DISPOSITION OF THIS CASE.

A. An Indigent Tenant Should Not Have To Surrender Possession Of His Shelter In Order To Appeal A Judgment Of Eviction.

It has been estimated that approximately eight million families are compelled by segregation and poverty to live in the slums of our central cities. See Schoshinski, "Remedies of the Indigent Tenant: Proposal for Change," 54 *Geo. L. J.* 519 (1966). In *Williams* v. *Shaffer*, 385 U.S. 1037 (1967), Mr. Justice Douglas graphically portrayed the plight of the indigent tenant.

> "The problem of housing for the poor is one of the most acute facing the Nation. The poor are relegated to ghettos and are beset by substandard housing at exorbitant rents. Because of their lack of bargaining power, the poor are made to accept onerous lease terms. Summary eviction proceedings are the order of the day. Default judgments in eviction proceedings are obtained with machine-gun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation." *Id.* at 1040 (Douglas, J., dissenting from denial of certiorari).

This Court has not yet held that a tenant has the right to stay in possession of his shelter until all possible legal remedies have been exhausted; however, it has recognized as a fundamental interest an "indefeasible right of personal security, personal liberty and private property." *Boyd* v. *United States,* 116 U.S. 616, 630 (1886). As a matter of law, then, it would seem appropriate for this Court to recognize the right of an indigent tenant to exhaust all possible legal remedies in an action of summary process before being required to surrender possession of his shelter. Recognition of such a right to possession would seem to be consistent with evidence indicating that family disruption as a result of forced relocation caused by eviction is a crucial factor in perpetuating the poverty cycle. See generally Shoor, *Slums and Social Insecurity,* 68-73 (1964).

B. Appellate Review Is Vital To The Vindication Of An Individual Tenant's Rights And To The Development Of A Just And Equitable Body Of Landlord-Tenant Law.

Several years ago the National Conference on Law and Poverty concluded that as a prerequisite for providing broader legal representation for those seeking adequate housing it would be necessary to undertake "[f]undamental revision of the antiquated landlord-tenant law [through] . . . legal skill, time, perseverence, and freedom from retaliatory pressures." P. Wald, *Law and Poverty*: 1965 *Report to the National Conference on Law and Poverty* 20 (1965). This task would be impossible if new rights and remedies for indigent tenants could not be fashioned in our trial and appellate courts. See Shier, "Protecting the Interests of the Indigent Tenant: Two Approaches," 54 *Calif. L. Rev.* 670 (1966);

Schoshinski, "Remedies of the Indigent Tenant: Proposal for Change," 54 *Geo. L. J.* 519 (1966). Also see Comment, "Tenant Unions: Collective Bargaining and the Low Income Tenant," 77 *Yale L. J.* 1368 (1968) and "Tenant Rent Strikes," 3 *Columbia Journal of Law and Social Problems* 1 (1967), for recent developments in landlord-tenant relations.

This Court formally recognized the significance of litigation in the process of law reform when it noted in *NAACP* v. *Button,* 371 U.S. 415 (1963) that,

> . . .[U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances. *Id.* at 430.

This Court should now expand its statement in *Button* and properly acknowledge the importance of the appellate process in effecting legal and social change. In doing so, this Court should also weigh the inherent injustice that results from the exclusion of any minority group, including the indigent, from the appellate process.

The National Advisory Commission on Civil Disorders warned the Nation that frustration, bitterness, and riot are the end products of a system of government that not only excludes its citizens from the decision-making process but that denies them an opportunity to vindicate their legal rights in courts of law. *Report of the National Advisory Commission on Civil Disorders* 291-293 (paperback ed. 1968). Despite this admonition, the Connecticut appeal bond requirement, and others like it, serves effectively to deny indigent tenants an opportunity to vindicate their legal rights and to fashion new legal remedies through the appellate process.

C. The Existence In Other States Of Surety Bond Requirements That Serve As Effective Preconditions To Appeal In Actions Of Summary Process Makes This An Issue Of National Concern.

As part of our preparation for this case, the National Legal Aid and Defender Association has summarized the relevant statute law in other states (Appendix A) and circulated a questionnaire among its member legal aid offices (Appendix B) in an effort to determine, nationally, the status of indigent persons attempting to appeal in actions of summary process. Our findings indicate that in 42 states statutes, court rules, or a combination thereof set out requirements for a surety bond as a precondition to appeal in actions of summary process. Apparently, some lower court judges ignore their state's statutory bond requirements and waive the existing bond requirements or, in the alternative, set a "use and occupancy bond." See Appendix B. In most states that require the posting of a surety bond such an exercise of judicial discretion appears to be the exception rather than the rule.

The amount of the surety bonds required range from a "sum sufficient" to secure the claim of the adverse party as in Indiana and Connecticut to a Mississippi requirement that in order to stay execution of a writ of possession in ejectment, the appellant must give bond with surety "in a penalty equal to double the value of one year's rent of the land." (Appendix A at 4a) Access to the appellate process should be contingent neither upon an impossible bond requirement such as Mississippi's nor upon the fancy of a lower court magistrate or clerk as in Indiana and New Mexico. See, e.g. Appendix B at 14a where it is noted that in New Mexico the amount of the bond is set by the clerk.

Although there are no national statistics to document the actual number of eviction proceedings initiated each year, local figures indicate that the national number could be staggering. For example, in 1969 there were 42,013 eviction actions filed in Cook County, Illinois. (Information supplied by Peter Deuel, Assistant to Matthew Danaher, Clerk of the Circuit Court of Cook County.) Even this figure probably is low because several responses to our questionnaire indicate that many eviction actions never reach legal aid offices or the courts. See Appendix B at 15a (Cleveland, Ohio).

Some states have recognized the injustice rendered by unreasonable surety bond requirements and have acted to nullify these requirements. For example, Michigan recently amended a statute requiring a bond of nine times the monthly rental value of the premises to require a bond that is "reasonable." See Appendix B at 12a (Michigan). The amended statute permits rent to be paid into court as it becomes due during the pendency of an appeal. Tennessee apparently has abandoned a surety bond requirement as a condition for appeal because of doubt about its constitutionality. See Appendix B at 17a (Tennessee). As both appendices indicate, however, most states require bonds that effectively foreclose indigent tenants in actions of summary process from appellate review.

CONCLUSION

For the reasons stated we respectfully submit that the judgment of the Appellate Division of the Connecticut Circuit Court should be reversed, and that the case be remanded with directions to reinstate the appeal of the appellants from a judgment of eviction and to take whatever action is necessary in accordance with the opinion of the Court.

Respectfully submitted,

ALLAN ASHMAN,
1155 E. 60th Street,
Chicago, Illinois 60637,

Attorney for Amicus Curiae
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION.

APPENDIX A

STATE BOND REQUIREMENTS IMPOSED ON TENANTS WHO WISH TO REMAIN IN POSSESSION OF THEIR SHELTER WHILE APPEALING A JUDGMENT OF EVICTION.

Alabama

Bond required: Twice the yearly value of the rent of the premises. Statutory citation: *Ala. Code* tit. 7, §985.

Alaska

Bond required: Twice the rental value from rendition of judgment until the final judgment. Statutory citation: *Alaska Stat.* §09.45.080.

Arizona

Bond required: with surety for double the yearly rental value. Statutory citation: *Ariz. Rev. Stat. Ann.* §12-1179.

Arkansas

Bond required prior to trial. Amount: double the annual rent. Statutory citation: *Ark. Stat. Ann.* §34-1510.

California

Bond required if tenant is to remain in premises. The stay of execution on appeal is discretionary with the court. The amount of the bond is a sum to be fixed by the judge if stay is granted. Statutory citation: *Civ. Pro. Code* §§9843, 945.

Colorado

Bond required for all costs and damages which may accrue to the adverse party. If the action was for rent as well as possession, the defendant must deposit with the court the amount of rent found due in order to pursue the appeal. Statutory citation: *Colo. Rev. Stat. Ann.* §58-1-18.

(Appendix A)

Connecticut

Bond required: See argument. Statutory citation: *Conn. Gen. Stat. Ann.* §52-542.

Delaware

No bond required.

Florida

Bond required: to pay all costs, damages and expenses. Statutory citation: *Fla. Stat. Ann.* §§83.27 & 83.38. Appellate Rules 5.1; 5.9.

Georgia

Bond required for trial. Statutory citation: *Ga. Code Ann.* §61-303.

Hawaii

Bond required: To be fixed by presiding magistrate to cover all damages which the plaintiff may sustain by reason of the appeal. Statutory citation: *Hawaii Revised Statutes* §666-15.

Idaho

Bond required: with sureties, to the effect that the appellant will pay all damages & costs which may be awarded against him. Statutory citation: *Idaho Code Ann.* §13-203.

Illinois

Bond required in sufficient amount to secure rent, damages and costs, to be ascertained and fixed by the court. Statutory citation: *Ill. Rev. Stat.* ch. 57, §§19, 20.

Indiana

Bond required in a sum sufficient to secure the claim of the appellee. Statutory citation: *Ind. Ann. Stat.* §3-1610.

Iowa

No bond required.

(Appendix A)

Kansas

Bond required: double the value of the use and occupation of the property, from the date of the undertaking until the delivery of the property pursuant to the judgment, and all damages and costs that may be awarded. Statutory citation: *Kan. Stat. Ann.* §61-1011.

Kentucky

Bond required: to secure payment of costs and all damages caused by the appeal. Statutory citation: *Ky. Rev. Stat.* §383.255.

Louisiana

Bond required: amount of the appeal bond to be determined by the court in an amount sufficient to protect the appellee against all such damage as he may sustain as a result of the appeal. Statutory citation: *La Rev. Stat.* §4735.

Maine

Bond required: amount to cover all intervening costs and such reasonable rent of the premises as the judge shall adjudge. Statutory citation: *Me. Rev. Stat. Ann.* tit. 14, §6008.

Maryland

Bond required: to cover all rent in arrears and all costs including the value of the premises during the time tenant shall hold over as a result of the appeal. Statutory citation: *Md. Ann. Code* Art. 53, §4.

Massachusetts

Bond required: in such sum as the court orders, with sureties. Conditioned to pay all rent, damage and loss. Statutory citation: *Mass. Gen. Laws* ch. 239, §5.

Michigan

Bond required: a reasonable amount to be set by the court officer. Statutory citation: *Mich. Stat. Ann.* §27A. 5670(2).

(Appendix A)

Minnesota

Bond required: to cover all costs of the appeal and all rents and other damages justly accruing to the party excluded. Statutory citation: *Minn. Stat.* §566.12.

Mississippi

Bond required: with sureties, in a penalty equal to double the value of one year's rent of the land. Statutory citation: *Miss Code Ann.* §1165.

Missouri

Bond required: sufficient to secure the payment of all damages, costs and rent then due and to accrue. Statutory citation: *Mo. Rev. Stat.* §535.110.

Montana

Bond required: to cover use and occupation for the time of the appeal. Statutory citation: *Mont. Rev. Codes Ann.* §93-7904.

Nebraska

Bond required: to cover costs, amount of judgment, all sums of money that have accrued or may accrue for the use, occupation or rent of the lands or tenements. Statutory citation: *Neb. Rev. Stat.* §25-1907.

Nevada

Bond required: in an amount to be fixed by the court or justice, but which shall not be less than twice the amount of the judgment and costs and the value of the use and occupation of the property during the pendency of the appeal. Statutory citation: *Nev. Rev. Stat.* §40.380.

New Hampshire

No bond required.

New Jersey

No bond required.

(Appendix A)

New Mexico

Bond required: amount to be set by the clerk of the district court. Statutory citation: Rules of Pleading, Practice and Procedure for the Magistrate Courts for the State of New Mexico, Rule 42(b).

New York

No bond required.

North Carolina

Bond required: not less than one year's rent if tenant wishes to remain in possession during appeal. Statutory citation: *N.C. Gen. Stat.* §42-34.

North Dakota

Bond required with surety for all rents for use and occupation of the property and damages from the time of the appeal until the delivery thereof. Statutory citation: *N.D. Cent. Code* §33-11-11.

Ohio

Bond required in appeal from municipal court to the Court of Common Pleas: amount equal to the rent that will be owing to the landlord if he prevails. Statutory citation: *Ohio Rev. Code* §1923.14.

Oklahoma

Bond required: in an amount double the value of the use and occupation of the property from the date of the undertaking until delivery of the property. Statutory citation: *Okla. Stat. Ann.* tit. 15 §973.

Oregon

Bond required: twice the rental value of the property from commencement of the appeal until final judgment. *Ore. Rev. Stat.* §105, 160.

(Appendix A)

Pennsylvania

Bond required: with sureties, for payment of all costs and rent that have accrued or may accrue up to the time of final judgment. Statutory citation: *Pa. Stat.* tit. 68, §250.506.

Rhode Island

No appeal in forcible entry and detainer actions. Statutory citation: *R.I. Gen. Laws Ann.* §34-19-8.

South Carolina

Bond required: for all costs and damages which the landlord may sustain thereby. Statutory citation: *S.C. Code Ann.* §41-113.

South Dakota

Bond required: to cover use and occupation from the time of the appeal until the delivery of the property. Statutory citation: *S.D. Code* §33.0717.

Tennessee

Bond required: to cover costs and damages and the rents during the litigation. Statutory citation: *Tenn. Code Ann.* §23-1630 (note 1)

Texas

Bond required: to be approved by the Justice conditioned to pay all costs and damages which may be adjudged. Statutory citation: Rule 749. *Vernon's Texas Rules of Civil Procedure.*

Utah

Bond required: to secure the payment of costs of the appeal and the judgment. Statutory citation: *Rules of Civil Procedure* Rule 73 (c).

(Appendix A)

Vermont

Bond required: sufficient to pay the rent then due, and intervening rent, damages and costs. Statutory citation: *Vt. Stat. Ann.* tit. 12, §4857.

Virginia

Bond required: to cover all damages, costs and fees which may be awarded and all actual damages incurred. Statutory citation: *Va. Code Ann.* §8-477.

Washington

No bond required.

West Virginia

Bond required in suits for possession and rent: double the amount of damages plus one year's rent. In suits for possession only: one year's rent plus an additional sum between $50 and $100. Statutory citation: *W. Va. Code Ann.* §60-15-2.

Wisconsin

Bond required: for rent, costs and damages. Statutory citation: *Wis. Stat.* §29.11.

Wyoming

Bond required: to guarantee payment of accrued costs, costs to accrue and damages for the wrongful detention of the property. Statutory citation: *Wyo. Stat. Ann.* §1-690.

APPENDIX B

QUESTIONNAIRE SENT TO ALL CIVIL LEGAL AID OFFICES AND SELECTED RESPONSES THERETO.

MEMORANDUM Date: May 6, 1969

To: All Civil Offices
From: Allan Ashman
Re: Requirement of Posting Surety Bond in Order to Appeal Eviction

The NLADA is preparing an *amicus* brief in the case of *Simmons* v. *West Haven Housing Authority* (Supreme Court Docket No. 1232). A motion to proceed *in forma pauperis* was granted and probable jurisdiction was noted on April 7, 1969 (37 L.W. 3379). The main issue is whether a Connecticut statute (C.G.S.A. §52-542) which requires that appellants, as a precondition to their appeal from a judgment of eviction, post a bond with surety for rent which might accrue during the pendency of their appeal, regardless of their financial ability to obtain such a bond, amounts to an invidious discrimination among citizens on the basis of wealth, in violation of the Fourteenth Amendment.

The NLADA wishes to stress the national implications of the question at issue and urgently requests the following information from you.

1. Does your state have such a "precondition" to trial or appeal in an eviction case?
2. What is the practice with regard to posting a surety bond for rent in eviction cases in your state if there is no statutory requirement?
3. What cases involving this issue have been disposed of by your organization?
4. Could you provide us with available statistics on evictions in your area?

(Appendix B)

5. If the answer to question 4 is negative, could you provide us with the names of any persons or organizations who might keep such statistics, either for your area or nation-wide?

We would appreciate any information which you can give us on these questions. We have only a few weeks in which to prepare this brief and *urgently* request your immediate attention.

SELECTED RESPONSES.

Arizona

"In answer to your memorandum of May 6, 1969 regarding Amicus brief in *Simmons* v. *West Haven Housing Authority*, Arizona has a statute as to a bond on *appeal* in an eviction case. See Arizona Revised Statute Section 12-1179.

We had a case sometime ago on this matter and as our client could not afford to post the appeal bond we sought review by certiorari rather than appeal.

The court held that certiorari was not available as there was appeal available. The case was not taken to a higher court as the Housing Authority decided to let our client stay on."

May 21, 1969

Legal Aid Society of the
Pima County Bar Association

Illinois

"Re: Requirement of Posting Surety Bond in order to appeal eviction.

In Illinois our Forcible Entry and Detainer statute covers evictions, and requires a defendant to post an appeal bond in sufficient amount to secure accruing rent, damages and costs during the pendency of the appeal and until possession is turned over to the plaintiff if defendant loses the appeal. It would be virtually impos-

sible for a poor defendant to obtain a surety bond in Peoria from a commercial bond company. I do not know whether the Court would accept individuals as surety; it's doubtful whether a poor defendant would have a friend with sufficient finances to be an acceptable surety.

We have not appealed an eviction judgment, therefore, we have no experience to report the number of cases where an appeal has been made. To my knowledge there have not been any appeals of an eviction."

May 9, 1969 — Greater Peoria Legal Aid Society

Kentucky

"In response to your letter of May 6, 1969, in regard to the *Amicus* brief in *Simmons* v. *West Haven Housing Authority*, please be advised as follows:

1. K.R.S. 383.255 requires a bond in an appeal to the Circuit Court from a judgment of eviction in a magisterial court. The bond is to secure the payment of costs and all damages caused by the appeal.

K.R.S. 383.260 and *Parker* v. *Smith* 211 Ky. 624, 277 SW 986 provide that a landlord may recover double rent during the occupancy of the tenant after forcible detainer proceedings have been begun and also a reasonable attorney's fee if the traverser fails to prosecute his traverse with effect."

May 19, 1969 — Northern Kentucky Legal Aid Society, Inc.

Maine

"In response to the questions of your letter of May 6th I have checked the applicable Maine Statutes and case law and contacted several of our Staff Attorneys. The results are indicated below in the format in which you presented them.

(Appendix B)

1. ME. REV. STAT. ANN. tit. 14, §6008 (1964) indicates that '[W]hen the Defendant appeals, he shall recognize in like manner to the Plaintiff, conditioned to enter the action and to pay all intervening costs and such reasonable rent of the premises, as the Judge shall adjudge, if the judgment is not reversed.'

Merrill v. *Hinckley*, 49 Me. 40 (1860) and *Dennison* v. *Mason*, 36 Me. 431 (1953) seem to be the only two cases decided under this statute. They both hold that the terms of the statute are controlling and mean that only reasonable rent is allowed. Notwithstanding these two cases, in some communities local practice is to require a bond in the amount of twice the rental value."

May 21, 1969 — Pine Tree Legal Assistance, Inc.
Portland Area Office

Massachusetts

"In response to your memorandum of May 6, 1969, I submit the following information:

1. Massachusetts does have an appeal bond requirement (see Massachusetts General Laws, Chapter 239, Section 5). The bond must be filed within 24 hours and is conditioned upon securing rent already accrued, any damage to the property, and future rent. It should also be noted that a defendant in an eviction case cannot obtain a trial by jury without appealing from the District Court judgment.

2. I know of no general practice throughout the District Courts of Massachusetts. However, in the two District Courts in which I have confronted this issue, the bond requirements were automatically set at $500 secured by $500."

May 15, 1969 — Massachusetts Law Reform Institute
Boston, Massachusetts

(Appendix B)

Michigan

"Re: Requirement of Posting Surety Bond in Order to Appeal Eviction

Our state does have a requirement that a lessee post bond when appealing an eviction. Under the older law the amount was pegged at nine times the monthly rental. Legislation enacted last October revised this requirement to an amount which is reasonable. To the best of my knowledge we have handled only one case under the new law which has gone as far as appeal. In it the judge set bond at a figure slightly above the amount of the money judgment awarded plus the rent which would have been paid between the time of judgment and the setting of the bond. In addition he ordered that future rent be paid into the court, as a condition of prosecuting the appeal."

May 21, 1969 Washtenaw County Legal Aid Society
Ann Arbor, Michigan

"In reply to your questions of May 6, 1969 about bond requirements in Michigan the answers are as follows:

1. Yes, M.C.L.A. 600.5670 requires that a bond be required with a penalty to be fixed at a reasonable amount.

a) The practice is for the Court to allow the tenant to pay the judgment into court and the rent into court as it becomes due while the appeal is pending."

May 19, 1969 Neighborhood Legal Services Centers

"In response to your request dated May 6, 1969 regarding surety bond to appeal eviction, the following applies:

(Appendix B)

The state of Michigan does have a 'precondition' to appeal an eviction case. Please see an attached copy of the Michigan Law No. 600.5670.

However, the practice is to use Michigan Court Rule 763.11 (see attached) when there is an inability to post the bond based on financial reasons.

Please see the below four cases processed pursuant to the above procedure.

a) Margaret Elgleman vs Verne C. Hampton
Oakland County, Circuit Court,
CA 68-45918

b) Milton E. Evons vs Robert F. Lyle
Oakland County, Circuit Court,
CA 68-46994

c) Mary Gilbert vs Verne C. Hampton
Oakland County, Circuit Court,
CA 68-50171

d) Marie Gilbert vs Verne C. Hampton
Oakland County, Circuit Court,
CA 68-50172

Michigan Court Rules
§763.11

Stay of Proceedings without Bond. If a party required to give a bond under these rules for purposes of supersedeas, appeal or otherwise, is unable to give such bond by reason of poverty, the judge may, upon due proof of inability for such reason, limit or eliminate the requirement for a surety upon such bond, upon such conditions and for such reasonable time as the judge may determine."

May 20, 1969 Oakland County Legal Aid Society

(Appendix B)

New Mexico

"Re: Requirement of Posting Surety Bond to Appeal Eviction—Memo of May 6, 1969

2. In New Mexico, all appeals from Magistrate Court to District Court must be by bond. Rule 42(b)—Rules of Pleadings, Practice and Procedure for the Magistrate Courts of the State of New Mexico (1968). It is the practice here for the Clerk of the District Court to set the amount of the bond on appeal. This is generally twice the amount of the judgment in Magistrate Court."

May 9, 1969 Legal Aid Society of Albuquerque

North Carolina

"In response to your letter of May 6, 1969, I am submitting the following information relating specifically to five questions which you have raised:

1. North Carolina requires the posting of a Bond amounting to not less than one year's rent prior to the time that a tenant may *stay in possession* and appeal an adverse ruling of a Magistrate. As you will notice, our law does not require the posting of a Bond prior to the time that an appeal is allowed, but only requires such a Bond if the tenant chooses to stay in possession and appeal.

2. We might note that there is no statutory provision or rule of practice allowing this Bond requirement to be suspended."

May 14, 1969 Legal Aid Society of Mecklenburg County
Charlotte, North Carolina

Ohio

"3. What cases involving this issue have been disposed of by your organization? 400-500 per year

(Appendix B)

4. Could you provide us with available statistics on eviction in your area? 2591 in 1968, Hamilton County, Ohio"

May 21, 1969 — The Legal Aid Society of Cincinnati

"In reply to your request for information pertaining to the bond required when appealing from a judgment of eviction in the State of Ohio and to the available statistics on evictions in our area, the following remarks may be of some assistance as you draft your brief.

In Cleveland, an action for forcible entry and detainer is brought in the Cleveland Municipal Court. In order to continue that proceeding for more than eight days beyond the date upon which the action was filed, the bond required is for an amount equal to the rent that will be owing to the landlord if he prevails in the action. Ohio Revised Code, sec. 1923.08. An appeal of the Municipal Court decision may then be taken to the Court of Common Pleas in which case the same bond amount is required. Ohio Revised Code, sec. 1923.14. If further appeals are taken to the Court of Appeals and the Supreme Court, the bond requirements that must be met are the same as would apply in any other appeal situation. As a rule of thumb, the appellate courts will compute the potential amount of rent owed plus the legal expenses incurred by the landlord in defending the appeal and then require a bond equal to approximately twice that amount.

Our offices presently defend six hundred eviction actions a year. Of course, since the great majority of eviction problems never reach our offices or the courts, this figure is relatively meaningless."

May 6, 1969 — Legal Aid Society of Cleveland

(Appendix B)

Pennsylvania

"This is in response to your memorandum of May 6, 1969 regarding the 'Requirement of Posting Surety Bond in Order to Appeal Eviction.'

1. The (Pennsylvania) Landlord and Tenant Act of 1951 provides that, in an eviction case, 'either party may appeal (from the judgment of the justice of the peace) to the next Court of Common Pleas *upon filing in that court a bond with one or more sufficient sureties, conditioned for the payment of all costs and rent that have accrued or may accrue up to the time of final judgment* and for damages assessed, if any, in case the judgment shall be affirmed. . . . Such appeal shall not be a supersedeas to the writ of possession in any case except upon special allowance of the court to which the appeal is taken.' 1951, April 6, P.L. 69, Art. V, §506; 1953, July 25, P.L. 578 §1; 68 P.S. §250.506. (Emphasis added).

An appeal, from a judgment of a Court of Common Pleas 'in an action of ejectment or other action involving the title to or possession of real property where the judgment below is against the party in possession, shall operate as a supersedeas if the appellant gives bond with sufficient surety or sureties in double the sum he will probably have to pay, in case the judgment be affirmed. . . .' 1897, May 19, P.L. 67 §10; P.S. §1143.

However, the court from which the appeal is taken may 'make such orders as to right and justice shall belong relative to the security offered or entered, either as to approval thereof, addition thereto or substitution therefore whenever a proper case shall be made to appear requiring the action of said court.' 1897, May 19, P.L. 67, §17; 12 P.S. §1155.

Where a lease contains a confession of judgment clause, and the tenant must defend by commencing an action to open judgment and requesting a stay of eviction, the

(Appendix B)

requirement of security is within the discretion of the court.

2. In practice, the local courts usually either waive the surety bond, or require only a nominal or near-nominal amount ($1, $5, or $10)."

May 15, 1969 Neighborhood Legal Services Association
Pittsburgh, Pa.

Tennessee

"In reply to your memorandum of May 6 concerning the amicus brief in the case of *Simmons* v. *West Haven Housing Authority*, I have enumerated the questions and answers below:

1. Does your state have such a 'precondition' to trial or appeal in an eviction case?

Yes. By statute, a tenant can not appeal an eviction case while retaining possession unless a bond is posted for the costs. It can be appealed on the pauper's oath, however, if the tenant surrenders possession.

2. What is the practice with regard to posting a surety bond for rent in eviction cases in your state if there is no statutory requirement?

The practice, however, is not to require the bond. Even though the statute has not been challenged formally, it is not generally enforced due to its questionable constitutionality.

3. What cases involving this issue have been disposed of by your organization?

We had only one case challenging the board, but it was favorably disposed of without a trial in that the court felt the statute was unconstitutional and thereby inoperative."

May 15, 1969 The University of Tennessee,
College of Law
Legal Clinic
Knoxville, Tennessee

(Appendix B)

Texas

"In reply to your letter of May 6, 1969, relative to posting bond in order to appeal eviction, will state that evictions under the Texas practice are governed by statutes set forth in Title 64, V.A.C.S., Articles 3973 to 3975b and 3992 and Rules 739 to 755, Vernon's Texas Rules of Civil Procedure.

In answer to your specific questions:

(1) We do have a precondition to appeal in an eviction case by posting bond under Rules 749 and 750 and this has been construed to be mandatory and an Affidavit of Inability to Pay Costs may not be filed. Vincent vs. McPherson, Tex. Civ. App., 54 SW2d 829, no writ history."

May 8, 1969

Legal Aid & Defender Society of
Travis County, Texas
Austin, Texas

"Your letter of May 6, 1969, requested information from this office concerning whether or not Texas has a statute which requires an evicted person to post a bond for rent as a precondition to trial or appeal.

Rule 749 I.R.C.P. provides that either party may appeal a Justice Court decision in a 'Forcible Entry and Detainer Suit' to the County Court. In order for either party to appeal such a judgment, the appellant must post 'a bond to be approved by said justice, and payable to the adverse party, conditioned that he will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.' Therefore, a tenant who loses in the Justice Court and is evicted, must post a bond in order to appeal his eviction to the County Court. This bond is required in every case."

May 12, 1969

Waco Legal Aid Clinic
Waco, Texas

(Appendix B)

West Virginia

"Note Re: NLADA Amicus Brief in *Simmons* v. *West Haven Housing Authority* (U.S. S. Ct. Docket No. 1232)

The State of West Virginia does indeed have a 'precondition' imposed on appeals from orders of eviction.

In summary, evictions are judicially accomplished by bringing an action for unlawful detainer before a justice of the peace. Such an action may request damages and possession, or possession alone. If the plaintiff-landlord prevails, the justice of the peace issues a writ of possession (and if requested, assesses damages), appeal to a court of record ostensibly lies as a matter of right, and on appeal, the facts are tried *de novo.*

An appeal bond with surety is required by the following provision:

W. Va. Code §60-15-2

Appeal Bond

The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice . . . is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal. . .

. . . In suits . . . for the unlawful detention of real estate, if judgment be rendered for recovery of possession of the premises, either with or without damages for detention, *the bond shall be in a penalty double the amount of damages, where judgment has been rendered for damages for the detention, together with an amount sufficient,* in the opinion of the justice, or of the circuit or other appellate court or judge thereof, when the appeal is

granted by such court or judge, *to cover one year's rent of the premises. In such suits where judgment is not for damages for detention,* the *bond shall be* in a penalty equal to an amount *sufficient . . . to cover one year's rent of the premises, and an additional sum of not less than fifty nor more than one hundred dollars.* [Emphasis added]

Interpretation:

In essence, this statute requires bond for appeal of an eviction (possession) order of a justice of the peace. There are two circumstances described.

(1) Judgment rendered for complainant for possession and for damages for unlawful detainer. Bond here would be twice the damages plus an amount sufficient to cover one year's rents.

(2) Judgment for possession only. Bond requisite is an amount equal to one year's rent plus an additional 50 to 100 dollars (discretionary with justice).

Case law in West Virginia has held that the requirement of bond is mandatory and that no appeal shall be granted unless a bond with good security, approved by the justice, is filed with him. [*Staats* v. *McCarty,* 130 W. Va. 240, 43 S.E. 2d 826 (1947); *Powell* v. *Miller,* 41 W. Va. 371, 23 S.E., 557 (1895)].

Curiously enough, the legislature of the State has seen fit to heap insult upon injury in its erection of barriers. There is required the payment, in advance of appeal, of $5.00 for cost incurred by the clerk of the reviewing court. [West Virginia Code, §59-1-11]. In a spasm of great wisdom and compassion, the legislature has provided for the waiver of this $5.00 where the indigent person submits an affidavit of poverty "certified by the chief executive officer of a duly chartered legal aid society" to the proper collecting officer. (There is one

legal aid society in West Virginia, servicing three of the fifty-five counties) [West Virginia Code, §59-1-36].

The forma pauperis provisions in the state do not specifically authorize waiver of the bond or any part thereof or any reduction in the statutory amount.

It is the general practice in this office, when appealing an eviction to secure the requisite bond by soliciting the assistance of the department of public welfare (if the particular social worker is cooperative) or one of the local charitable-social agencies. All too often, however, obtaining the bond has been an impossibility and the client has been forced to give up any attempt to appeal."

May 13, 1969

Legal Aid Society of Charleston
Charleston, West Virginia

LIBRARY
SUPREME COURT, U. S.

5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MOTION FILED

AUG 7 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION
OF THE CONNECTICUT CIRCUIT COURT

No. 265

GLADYS BODDIE, *et. al.*,

Appellants,

—v.—

THE STATE OF CONNECTICUT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 266

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,

Appellants,

—v.—

THE STATE OF GEORGIA, *et al.*,

Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, THE NATIONAL HOUSING LAW PROJECT AND COMMUNITY ACTION FOR LEGAL SERVICES, INC.

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

JOHN DeWITT GREGORY
NAPOLEON B. WILLIAMS,
80 William Street
New York, N. Y. 10038

Attorneys for Comunity Action for Legal Services, Inc.

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

INDEX

PAGE

Motion for Leave to File Brief *Amici Curiae* and Statement of Interest of the *Amici* 2

Brief *Amici Curiae* 8

Statement of the Cases 8

Introduction and Summary of Argument 11

ARGUMENT

I. The Equal Protection clause prohibits states from denying Court access to poor persons seeking to protect their homes or adjudicate their marital status 15

A. Classifications Based on Poverty Contravene Equal Protection Unless Justified by Some Compelling State Interest 19

B. Access to the State Courts in Eviction and Divorce Proceedings Is a Right of Fundamental Importance Which May Not Be Denied to the Poor Unless Justified by a Compelling State Interest 21

C. There Is No Justification for the Practices Challenged Herein 25

D. Conclusion of Equal Protection Argument .. 29

II. Requiring court fees or costs of an indigent litigant as a condition to asserting his rights before a court of law deprives him of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution .. 30

PAGE

A. The Right to a Hearing Before a Court of Law Cannot Be Made Dependent on the Ability to Pay Certain Fees or Costs 30

B. The Financial Requirements Challenged by Appellants Herein Are an Arbitrary and Unreasonable Restriction Upon the Judicial Process 35

C. Appellants Are Being Deprived of Rights Under the Due Process Clause 37

III. Conditioning access to the Courts on posting bond or fees deprives appellants of freedom of expression and association and the right to petition the Government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution 40

A. Access to the Courts Is a Form of Expression and a Means of Petitioning the Government for Redress of Grievances Which Is Protected by the First Amendment 40

B. The Imposition of Costs for Divorce Proceedings Inhibits Appellants' Exercise of Their Freedom of Association and Right to Marry and Procreate 44

CONCLUSION 46

APPENDIX

Publicly Funded Programs Providing Legal Services to the Poor Cannot Supply Bonds for Litigation Purposes 47

Table of Authorities

PAGE

Cases:

Anders v. California, 386 U. S. 738 (1967) 34

Baggett v. Bullett, 377 U. S. 360 (1964) 41
Bolling v. Sharpe, 347 U. S. 497 (1954) 36
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673 (1930) 30, 31-32
Brotherhood of Railway Trainmen v. Virginia, 377 U. S. 1 (1964) 40
Burns v. Ohio, 360 U. S. 252 (1959) 20, 24, 34

Carrington v. Rash, 380 U. S. 89 (1965) 15
Chambers v. Baltimore & Ohio R.R., 207 U. S. 142 (1907) 21, 22
Chicago, St. Louis Ry. v. Moss, 60 Miss. 641 (1882) 19
Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 30, 31
Covey v. Somers, 351 U. S. 141 (1956) 30, 32

Damico v. State of California, 389 U. S. 416 (1967) 41
Draper v. Washington, 372 U. S. 487 (1963) 20, 35

Edwards v. California, 314 U. S. 160 (1941) 20, 21
Edwards v. Habib, 397 F. 2d 687 (1968) 23, 33, 42
Engel v. Vitale, 370 U. S. 421 (1962) 41
Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214 (1958) 35

Forbes v. Board of Commissioners, 258 U. S. 338 (1922) 39
Frank v. Mangum, 237 U. S. 309 (1914) 34
Freedman v. Maryland, 380 U. S. 51 (1965) 41

PAGE

Giozza v. Tiernan, 148 U. S. 657 (1892) 36
Greene v. McElroy, 360 U. S. 474 (1959) 41
Griffin v. Illinois, 351 U. S. 12 (1956) 20, 24, 25, 34, 37
Griswold v. Connecticut, 381 U. S. 479 (1965) 44, 45
Gulf, Colorado & Western Ry. v. Ellis, 165 U. S. 150 (1897) 15, 18

Hackin v. Arizona, 389 U. S. 143 (1967) 42
Harman v. Forssenius, 380 U. S. 528 (1965) 32
Harper v. Virginia Board of Elections, 383 U. S. 663 (1966) 20, 23, 24
Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968) 41-42
Holt v. Virginia, 381 U. S. 131 (1965) 39
Hovey v. Elliot, 167 U. S. 409 (1897) 30

Jacobellis v. Ohio, 378 U. S. 184 (1964) 41
Jeffrys v. Jeffrys, 58 Misc. 2d 1045 (N. Y. Sup. Ct., Kings Co., 1968) 28
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951) 31
Jones v. Union Guano Co., 264 U. S. 171 (1924) 35

Kelly v. Wyman, 294 F. Supp. 887 (S. D. N. Y. 1968), probable juris. noted, April 21, 1969, 37 U. S. L. W. 3399 (1969) 42
King v. Smith, 392 U. S. 309 (1968) 41

Lane v. Brown, 372 U. S. 477 (1963) 34
Leeper v. Texas, 139 U. S. 462 (1890) 36
Loving v. Virginia, 388 U. S. 1 (1967) 39, 45

PAGE

Maynard v. Hill, 125 U. S. 190 (1888) 39, 45
McLaughlin v. Florida, 379 U. S. 184 (1964) 19
Meyer v. Nebraska, 262 U. S. 390 (1923) 45
Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340 (1913) 37
Morey v. Doud, 354 U. S. 457 (1957) 32
Morgan v. United States, 304 U. S. 1 (1938) 30
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 30, 32
Murdock v. Pennsylvania, 319 U. S. 105 (1943) 32, 41

NAACP v. Button, 371 U. S. 415 (1962) 40
Near v. Minnesota, 283 U. S. 697 (1931) 41

Ownbey v. Morgan, 256 U. S. 94 (1921) 35

Pasqua v. DeMarchi (N. Y. Sup. Ct. App. Div. 4th Dept., January 1969) 42
Pierce v. Society of Sisters, 268 U. S. 510 (1925) 44, 45
Pritchard v. Norton, 106 U. S. 124 (1882) 38, 39

Reste Realty Corp. v. Jay M. Cooper (N. J. Supreme Ct. No. A-45, March 17, 1969) 42
Rinaldi v. Yeager, 384 U. S. 305 (1966) 34

Schenck v. United States, 249 U. S. 47 (1919) 41
Schroeder v. New York, 371 U. S. 208 (1962) 30
Shapiro v. Thompson, —— U. S. ——, 89 S. Ct. 1322 (1969) 20, 41
Shelley v. Kraemer, 334 U. S. 1 (1948) 38
Skinner v. Oklahoma, 316 U. S. 535 (1942) 19, 44, 45
Smith v. Bennett, 365 U. S. 708 (1961) 20, 24, 34
Sniadach v. Family Finance Corp., —— U. S. ——, 89 S. Ct. 1820 (1969) 31, 42

PAGE

Thompson v. City of Louisville, 362 U. S. 199 (1960) .. 30
Thorpe v. Durham Housing Authority, 380 U. S. 670 (1967), —— U. S. ——, 37 U. S. L. W. 4068 (1969) .. 42
Truax v. Corrigan, 257 U. S. 312 (1921) 36

United Mine Workers of America v. Illinois State Bar Association, 389 U. S. 217 (1967) 40, 44
United States v. Carolene Products Co., 304 U. S. 144 (1938) 19

Waskey v. Chambers, 224 U. S. 564 (1912) 38
Western Union Tele. Co. v. Kansas, 216 U. S. 1 (1909) 32
Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969) 41
Williams v. North Carolina, 325 U. S. 226 (1944) 38

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 15

Constitutional Provisions:

United States Constitution

First Amendment 14, 22, 40, 43, 44
Sixth Amendment 25
Fourteenth Amendment 12, 14, 15, 29, 30, 33, 40, 44, 46

Federal Statute:

42 U. S. C. §1983 81

Connecticut Statute:

Conn. General Stat. §52-542 10

Georgia Statutes:

Georgia Code Ann. §§61-301, 61-302, 61-304 8

PAGE

Other Authorities:

American Law of Property, Vol. I, §3.38, p. 252 (1952) 38

Klevens, "Poverty and Equal Access to the Courts: the Constitutionality of Summary Dispossess in Georgia," 20 Stanford L. Rev. 766 (1968) 32

Powell, The Law of Real Property, Vol. 2 §221, p. 177 (1967) 38

"Public Provision for Costs and Expenses of Civil Litigation," Report of the American Bar Foundation, June, 1966, p. 10 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CONNECTICUT CIRCUIT COURT

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARRY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

—v.—

THE STATE OF CONNECTICUT; EDWARD HOROWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 266

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,

Appellants,

—v.—

THE STATE OF GEORGIA; THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE,

Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants Center on Social Welfare Policy and Law, National Housing Law Project and Community Action for Legal Services, Inc., respectfully move the Court for permission to file the attached brief *amici curiae* for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) The Center on Social Welfare Policy and Law is the specialized law reform resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the School of Law of Columbia University, the Center undertakes research pertaining to the legal rights of the poor, particularly as to public assistance and other government benefit programs, and supports other OEO-funded legal services programs through education and assistance in the preparation of important litigation. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals.

(2) The Center has concerned itself with many basic legal issues affecting poor persons, involving public assistance, housing, and food and agricultural programs. In working with lawyers serving the poor on these and many other issues, the Center has become acutely aware of the very basic procedural problems faced by poor persons before they are able to assert their substantive legal rights. Among these problems are the financial barriers imposed by just such statutes as are at issue in the three cases considered herein.

(3) The National Housing Law Project was instituted by the Office of Economic Opportunity in recognition of the marked increase in legal service activities in the housing and urban law area. The Project provides specialists' services to neighborhood legal service lawyers and performs independent activities in the areas of private landlord-tenant relations, urban renewal, sponsorship of low-income housing production, and other matters relating to housing and urban affairs. The Project maintains extensive resources of information in all of these areas.

(4) The handicaps faced by the low-income tenant in eviction proceedings are of particular concern to the Project and the offices it serves. Chief among these is the necessity to post bond at various stages of an eviction proceeding, a requirement which inhibits both the assertion of private rights and the creation of meaningful new protections for all tenants.

(5) Both the Center and the National Housing Law Project provide services to the approximately 265 Legal Services Projects in the United States, which are staffed by

more than 1800 attorneys. These attorneys advise and represent approximately 500,000 low-income clients annually. The *amici* believe that all legal service lawyers are severely handicapped in their ability to serve their clients by financial barriers to judicial proceedings. Therefore they have a vital interest in presenting to this Court the full range of issues raised by this case.

(6) Community Action for Legal Services, Inc. ("CALS") is the central coordinating corporation for ten other corporations which provide free legal services to the indigent in the twenty-six designated poverty areas of New York City. CALS is a special community action program funded by the United States Office of Economic Opportunity under the provisions of Section 222(a) (3) of the Economic Opportunity Act, 42 U. S. C. §2809 (a) (3) (1967). Permission for CALS to practice law pursuant to Section 495(5) of the Judiciary Law was granted by the Appellate Division, First Department, on October 10, 1967.

(7) As the entity charged with the primary responsibility for providing free legal services to residents of the poor neighborhoods of New York City, CALS has an obvious and immediate interest in legal issues affecting the indigent. Since, as will be subsequently demonstrated, the instant cases present significant questions relating to the right of access to the courts by poor persons in order to vindicate statutorily granted rights and remedies, CALS respectfully seeks the permission of this Court to intervene as *amicus curiae* in support of appellant's motion for leave to appeal herein.

(8) Counsel for all appellants have consented to the filing of a brief *amici curiae* by the movants. Counsel for appellees have not consented.

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

JOHN DEWITT GREGORY
NAPOLEON B. WILLIAMS
80 William Street
New York, N. Y. 10038

Attorneys for Community Action for Legal Services, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CONNECTICUT CIRCUIT COURT

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARRY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

—v.—

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 266

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,
Appellants,

—v.—

THE STATE OF GEORGIA; THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE,
Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

BRIEF *AMICI CURIAE*

Statement of the Cases

***Sanks* v. *Georgia*, No. 266.**

Appellants are tenants in a publicly owned housing development in Atlanta, Georgia. They received a notice of eviction for nonpayment of rent based on an affidavit filed with the court by their landlord. Under Georgia Code Ann. §§ 61-301 and 302 such an affidavit is sufficient to bring about the issuance of a dispossessory warrant ordering the Sheriff or Marshal to evict the tenant and his possessions. The tenants sought to raise several defenses to the eviction by filing a counter affidavit and obtaining a trial on the facts at issue.

In order to file such an affidavit, Georgia Code Ann. §61-304 requires that the tenant "tender a bond with good security payable to the landlord, for the payment of such

sum, with costs, as may be recovered against him on the trial of the case." The amount of the bond normally includes *twice* the amount of rent due and owing when the tenant vacates the premises, which amount the tenant may be subject to pay should he be found to have unlawfully stayed over. The amount of the bond is typically based upon six months to one year's rent, thereby requiring a total sum of as much as twice one year's rent plus costs.

Tenants were unable to afford the costs of the required security bond, for which they would have had to post full collateral. They were consequently foreclosed under the Georgia statutes from any hearing whatever of their defenses to the attempted eviction and were rendered vulnerable to summary eviction. No similar bonds, obligations or restrictions are placed upon landlords.

The Fulton County, Georgia, Civil Court, held that the summary eviction procedures herein at issue are violative of plaintiffs' constitutional rights under the Equal Protection and Due Process clauses of the United States and Georgia Constitutions as well as the Access to the Courts clause of the Georgia Constitution. Georgia Civil Court, Fulton County, Warrant Nos. 63610, 69418 and 66636 (October 2, 1968). This decision was reversed by the Georgia Supreme Court. *State of Georgia* v. *Sanks*, Nos. 603, 604 (January 23, 1969). In a companion case, the same court held that requiring the double rent judgment was not violative of either Equal Protection or Due Process. *Meltzer* v. *C. Buck LeCraw and Co.*, Georgia Supreme Court No. 605 (January 23, 1969).

***Simmons* v. *West Haven Housing Authority*, No. 81.**

Appellants were tenants in a public housing development run by the West Haven Housing Authority. As in *Sanks*, they were the subject of summary eviction proceedings. They raised several special defenses in the Connecticut trial court, but that court ruled against them, making no mention of those special defenses. Tenants' attempted appeal was frustrated by the Connecticut statutory requirement that a bond be posted with surety to secure the landlord for all rent which may become due during the pendency of the appeal before a tenant in possession may appeal. Conn. General Stat. § 52-542. Lacking full collateral for the amount of the required bond (approximately $432 for six months' rent) tenants were unable to appeal the merits of their claim. Tenants then requested leave to pay rent monthly into court in lieu of a full bond during the pendency of the appeal. The trial court refused their request and ordered immediate eviction.

The Connecticut Circuit Court, Appellate Division, dismissed plaintiffs' appeal of the trial Court's refusal to waive the bond requirement and held the requirement constitutional. *Simmons* v. *West Haven Housing Authority*, File No. CV 8-677-5985 AP (March 7, 1968). Certification for review by the Supreme Court of Connecticut was denied (June 25, 1968). Tenants have deposited $360 with the Connecticut Circuit Court, as rent for the five months during which they remained in possession after the judgment of eviction. This money has not been returned to plaintiffs and will be used to secure the Housing Authority's claim for rent owed during the *Simmons* tenancy should plaintiffs' appeal be allowed to proceed without bond.

***Boddie* v. *Connecticut*, No. 265.**

Appellants are recipients of public assistance who desire to file for divorce in the Connecticut state courts. They are unable to tender the necessary fees for filing and service of process which, in such actions, range from $55 to $195.[1] Since appellants receive only a bare subsistence allowance, all of which must be used for food, shelter and personal needs, they will never be able to put aside the sum required for divorce in Connecticut. They are therefore prohibited from remarrying and from establishing a self-supporting family unit for themselves or their dependent children, solely because of their poverty. Appellants seek reversal of a three-judge federal district court decision upholding the constitutionality of the Connecticut practices. *Boddie* v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

Introduction and Summary of Argument

Amici adopt the unusual course of submitting a single brief in the *Boddie*, *Sanks* and *Simmons* cases because of their conviction that these cases present a single fundamental issue: namely, whether a court of the United States may determine issues of crucial importance to the involved individuals—shelter and marital status—while denying these individuals a hearing because of their poverty.

Amici's basic contention is that a United States court may not constitutionally refuse to adjudicate a person's marital status, nor deprive a person of his home because

---

[1] Forty-five dollars to court as filing fee; $10 to $15 to sheriff for personal service; or $100 to $150 to a newspaper for service by publication.

that person is too poor to afford the statutorily imposed costs of justice. This position is, in our view, a necessary corollary of the most fundamental precepts of American constitutional democracy. At the very core of our own image of ourselves as a free people is the notion of limited government, which means, above all, a government that is permitted to exert its coercive force only in accordance with law. Central to such limitation in the use of force, to limited government, to freedom itself, is access to the courts, which in the United States have been uniquely charged with ultimate responsibility for ensuring that the coercive powers of government are exerted lawfully and for protecting individual liberties by so limiting the use of coercive force. *Boddie, Sanks* and *Simmons* present this issue in its most elemental form, seeking, on the one hand, a full and fair hearing of their claim that their landlord's attempt to evict them from their dwellings is unlawful and, on the other, an adjudication of marital status upon which the possibilities of future marital associations, of reconstructed family life, of freedom from the coercion of cruelly irrelevant criminal sanctions all depend.

So fundamental are appellants' claims to the institutions upon which our traditions of limited government and freedom are founded that they can be articulated in terms of a number of particular, traditionally recognized constitutional doctrines.

Equal Protection

The practices challenged herein are unconstitutional first because they deny the individuals involved the equal protection of the laws guaranteed to all persons by the Fourteenth Amendment. They deny them equal protection be-

cause they deprive them of the opportunity to plead their case for a reason which bears no rational relation to their just entitlement to a hearing.

Moreover, one deals here not with arbitrary and unreasoning caprice, but with something much worse, more clearly offensive to equal protection. One deals with a practice which, whether by design or inadvertence, imposes a distinctively harsh and restrictive regime upon the poor, a practice which denies the poor alone the power to protect their homes and reorder their shattered marital destinies. Because the practices challenged involved a discrimination based upon indigence, they, like other classifications based on status—race, nationality, religion, illegitimacy—must fall unless the state can produce a compelling justification which can be served by no less offensive means.

Finally, one deals here with matters traditionally recognized as being peculiarly within judicial competence: access to the courts, access to resolution of issues of central significance to the persons involved: shelter and marital status. Where matters of such character are involved, the courts have long and appropriately applied the most stringent standards in assessing proffered justifications. By such standards, the practices challenged herein must fall.

Due Process

No person may be deprived of life, liberty or property without due process of law. Of the various particular requirements which courts have over the years distilled from this most basic of our constitutional protections, the most central is the notion that the government may not apply its coercive powers against an individual without first per-

mitting the individual a hearing. Reduced to its simplest terms, appellants here seek no more than a full and fair hearing before the coercive powers of the state are applied to destroy a home and perpetuate a marital status which time long ago rendered a fiction.

First Amendment

The practices challenged herein also involve grave implications for First Amendment freedoms, rendered applicable to the states through the Fourteenth Amendment. The results reached below deny appellants their constitutionally guaranteed right to petition the government for the redress of grievances. The right to petition the government for the redress of grievances includes access to the judiciary. Foreclosing such access because of a person's indigence is not a reasonable regulation of access to the courts. Particularly are such practices unreasonable burdens on the right to petition the government where access to the courts is sought for the urgent purpose of defending one's home or securing adjudication of marital status.

The family is an association within the protections accorded associations by the First and Fourteenth Amendments. The refusal to permit appellant a resolution of her marital status denies her the freedom to form a new family, immures her in a marital status which has no reality, and exposes her to criminal sanctions should she seek to establish a new family. Appellant is denied her freedom of association not because she does not meet the substantive standards required by the state but because she is too poor to purchase access to the courts. To deny a person freedom of marital association because of her indigence is to impose an impermissible burden on freedoms guaranteed by the First and Fourteenth Amendments.

ARGUMENT

I.

The Equal Protection clause prohibits states from denying Court access to poor persons seeking to protect their homes or adjudicate their marital status.

The Equal Protection clause of the Fourteenth Amendment imposes on all state action the minimal requirement that distinctions in the implementation of public policy bear some rational relation to the objectives of that policy. Amici contend that the practices involved in *Boddie*, *Sanks*, and *Simmons* fail to meet even this minimal requirement because these practices bar persons from access to State Courts for a reason—their poverty—which bears no rational relationship to the primary purpose served by such access. See, *inter alia*, *Gulf, Colorado & Western Ry.* v. *Ellis*, 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Carrington* v. *Rash*, 380 U. S. 89 (1965).

There can be no doubt that the charges imposed by the States of Georgia and Connecticut effectively bar the poor from such access. The tenants' evidence of their inability to post the required bond in *Sanks* was uncontradicted; in *Simmons*, the Connecticut courts did not dispute that the charges would bar appellants from an appeal; in *Boddie*, Judge Smith, dealing with a motion to dismiss, clearly assumes that "these plaintiffs are effectively barred from bringing suit by the filing fee and other costs." 286 F. Supp. 968, 972. The showing of incapacity made by appellants below is characteristic of the problem which confronts the poor. The base amount of the bond required in the *Sanks* and *Simmons* cases typically ranges from six months' to one year's rent. In Georgia, moreover, prevail-

ing practice normally requires that bond be posted for twice the rent potentially owing to ensure payment of the double-rent penalty. In *Boddie*, the practices challenged typically require payments ranging between $50 and $200. That payments of such amounts are beyond the reach of the poor should require no elaborate demonstration. Particularly is this clear in the case of welfare recipients, such as some of the appellants, whose only source of support is carefully calculated to make saving impossible and is, moreover, reduced to exhaust any significant receipts or savings which may perchance occur. Moreover, it cannot be said that the resources of the expanding legal services programs avoid such preclusion by making the needed resources available. *See* the Appendix hereto for Amici's collection of information on this point.

It would therefore be inaccurate and misleading to conceive of the practices here involved simply as charges or taxes. It is of crucial importance never to lose sight of the fact that from the standpoint of foreclosing judicial access, there is no difference between the practices challenged and an outright ban on paupers. Put most simply, the issue is whether a State may *bar* the poor from its courts in summary eviction and divorce proceedings.

Foreclosing the poor from judicial access while affording it to the affluent creates a distinction which bears no rational relationship to the purposes which the judiciary serves in eviction and divorce proceedings. In an eviction proceeding, the court sits to determine who is lawfully entitled to possession of real estate, to adjudicate conflicting claims to dominion over property. It is in relation to this primary purpose that any denial of access, and the distinctions which such denial imports, must first be judged. When so evaluated, the essential irrationality of

the Connecticut and Georgia practices clearly emerges. Can it be said that this purpose provides any basis for justifying distinctions based on poverty and affluence? Can it be said that the poor as a class are not in need of such access? Like others, indeed with greater frequency, the poor are tenants in this world, and as these cases testify, the poor are often in need of protection against their landlord's predations. Can it be said that a man's poverty is grounds for assuming that his defense to an eviction will lack merit? To ask these questions is to answer them, and more importantly, to reveal that there exists no rational relationship which would justify the exclusion of the poor from access to the judiciary in summary eviction proceedings.

In divorce proceedings, the court sits to determine whether the facts of a particular domestic situation meet the criteria which the state has established to govern the dissolution of marital unions, and to perform the subsidiary tasks of reconstituting the financial and, where there are children, the custodial basis of the future family. The State has, of course, a critical interest in the formation, stability and dissolution of families, an interest as parens patria which entails a greater measure of state involvement. However, neither this greater involvement nor the purposes which the judiciary serves in divorce proceedings provides any basis for excluding the poor as a class from courts in the adjudication of marital status. Indeed, the marital and family problems of the poor have gained wide recognition as one of our major contemporary social crises. One cannot say that because a woman is poor, she will have no need of judicial access in marital proceedings. One cannot say that because she is poor, her grounds for divorce will be frivolous. As in eviction proceedings, ex-

clusion of the poor from the courts bears no rational relationship to the purposes for which such access is generally afforded.

Amici's first point is then that when one clearly perceives the true nature of the practices challenged: exclusion of the poor from the courts; and couples this perception with an accurate articulation of the primary purposes served by court access in eviction and divorce proceedings, the essential irrationality of these practices becomes clearly apparent. Lacking any rational relationship to these primary purposes, the practices challenged herein fail of the minimal requirements of the equal protection clause for any government action and must accordingly be condemned as unconstitutional.

Appellants in *Sanks* and *Simmons* are denied equal protection not only because they are denied judicial access which is afforded to the affluent community but also because they are subjected to burdens not visited upon the adversary landlords. Though tenants must post bond to protect landlords against damages resulting from their defense of an eviction proceeding, no comparable obligation is imposed upon landlords to secure tenants against the potentially much more serious damages eventuating from a wrongful eviction. Such disparate treatment of adversaries to a lawsuit is flagrantly inconsistent with the duty of even-handed treatment of litigants which has been part of the equal protection clause since its earliest days. Thus in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150 (1897), this Court condemned state legislation which permitted plaintiffs against railroad companies to obtain costs and punitive damages while denying correlative rights to

defendants. See also *Chicago, St. Louis Ry. v. Moss*, 60 Miss. 641 (1882), where classic statement is made of this governing principle:

> "All litigants, whether plaintiff or defendant should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated." 60 Miss. at 646-7.

A. *Classifications Based on Poverty Contravene Equal Protection Unless Justified by Some Compelling State Interest.*

The standard which must be met in justifying a distinction utilized in the implementation of public policy is not uniform for all cases. The degree of latitude which this Court has allowed state legislatures in drawing such distinctions has varied with the circumstances involved. See, *inter alia*, *Skinner v. Oklahoma*, 316 U. S. 535 (1942); *McLaughlin v. Florida*, 379 U. S. 184 (1964); *United States v. Carolene Products Co.*, 304 U. S. 144 (1938). It could hardly be otherwise. The importance of the private interests affected, judged both in terms of personal impact on the individuals involved and of constitutionally recognized values; the relative competence constitutionally assigned to the legislature and the judiciary over the matter in question; the character of the classification—all legitimately affect the stringency with which a court will examine proffered justifications. Amici contend that all these factors require that respondents in this case demonstrate not a mere rational relationship between distinction and purpose, but a compelling state interest which makes the distinction necessary for the attainment of critical state ends.

A compelling justification is required first because the classification here employed is one based on poverty, a factor which—like race, nationality and religion—is peculiarly offensive to our notion of equal protection because it burdens an individual because of his status. It deprives a person not because of what he has done, but because of what he is, and in so doing it denies him the right as a man to be treated as any other man. The practices herein challenged deny that a poor man is as good as any other man; they assume that he is not worthy of that hearing which his affluent brothers are accorded as a matter of right.

The particularly objectionable quality of classifications based on poverty has long been recognized by our courts. A state may not exclude persons from its boundaries because of their indigence, *Edwards* v. *California*, 314 U. S. 160 (1941); nor may it seek to deter the entry of indigents by denying public assistance, *Shapiro* v. *Thompson*, —— U. S. ——, 89 S. Ct. 1322 (1969); nor may it exclude the poor from its elections by burdening the franchise with taxes, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Similarly, a state may not bar indigents from taking criminal appeals by requiring them to provide transcripts which are beyond their means, *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Draper* v. *Washington*, 372 U. S. 487 (1963); or by charging appellate docket and filing fees, *Burns* v. *Ohio*, 360 U. S. 252 (1959); nor may a state impose charges which preclude indigents from filing habeas corpus petitions, *Smith* v. *Bennett*, 365 U. S. 708 (1961).

The attitude taken toward classifications based on poverty by the judiciary of this country is perhaps best sum-

marized in Justice Jackson's concurring opinion in *Edwards* v. *California, supra*:

> "We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color." 314 U. S. at 184-5.

To exclude a person from access to the courts because of his poverty is to make use of a classification traditionally subject to the most searching appraisal by our courts. Where such exclusion bears no relation to the primary purpose served by such access, there can be no justification for it, let alone the compelling state interest which must be demonstrated to save it.

B. *Access to the State Courts in Eviction and Divorce Proceedings Is a Right of Fundamental Importance Which May Not Be Denied to the Poor Unless Justified by a Compelling State Interest.*

Demonstration of a compelling state interest in the practices challenged herein is also required because of the critical importance of court access to the persons involved and to the institutions established by our constitution. Where matters of smaller significance are involved, a lesser degree of justification may pass muster in defense of a distinction. But here we are concerned with one of the most fundamental of American constitutional rights. As this Court put the point in *Chambers* v. *Baltimore & Ohio R.R.*, 207 U. S. 142, 148 (1907):

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

Indeed, so fundamental is the right of access to the courts that it has long received constitutional protection wholly apart from the equal protection clause. Of importance to our constitutional system equal to that of equal protection is the right not to be deprived of life, liberty or property except by due process of law. Central to the concept of due process is the right to a hearing. It is no more than this that appellants in the *Sanks* and *Boddie* cases seek. Distinctions foreclosing to some a right which itself receives the independent protection of the due process clause can be accepted only if they are clearly justified by some compelling state interest, and as Amici have sought to demonstrate above, the distinctions here challenged are justified by no such interest.

Access to our judicial institutions is protected by the due process clause and the First Amendment because of the courts' critical role in maintaining our constitutional system and the liberties which that system protects. It is, as was said in the *Chambers* case above, a right which is conservative of all others. The right to possession of premises to which a tenant may be lawfully entitled, the right to form a new family cannot be effectively protected without the opportunity to be heard. Moreover, without such an opportunity, other rights may be sacrificed. An eviction may, under certain circumstances, constitute a punishment for exercise of the rights of free speech, free press or free

association. See, *inter alia, Edwards* v. *Habib*, 397 F. 2d 687 (1968). To ensure that such rights are conserved, access must be afforded.

In this respect, the cases here involved raise somewhat the same issue as that adjudicated by the Court in *Harper* v. *Virginia Board of Elections, supra,* where a Virginia poll tax was declared violative of the equal protection clause. Just as the Court there sought to protect the poor's access to the legislature by protecting their franchise, so here the court is asked to protect the poor's access to the courts. Indeed, in some respects, *Boddie, Sanks* and *Simmons* present a situation even more demanding of protection, for while the financial burden imposed by the Virginia poll tax was nominal, there can be no doubt that the charges here attacked are absolutely preclusive for the poor. Further, the right protected in *Harper,* the poor's right to the franchise, lacks the explicit constitutional recognition given the right to a hearing by the due process clause.

Access to state courts in divorce and eviction proceedings is critical not only because of the role which such access plays in our constitutional system; it is critical also because of its importance to the individual in purely personal terms. One need not elaborate on the significance to a man of the right to defend his own home; of the civil wrongs which could be perpetrated against an individual, few rise to the seriousness of the unlawful deprivation of his shelter. Similarly, the right to adjudication of marital status is the necessary prerequisite to remarriage and the reconstitution of shattered family destinies. Eloquent is the testimony of knowledgeable individuals of the hardship and disgrace enforced upon women in this country who, abandoned by their husbands and offered the opportunity of remarriage,

are barred by their poverty from securing judicial dissolution of marriages which have for years been fictions.

The character of the right involved in this case calls for the closest scrutiny not only because of its personal and constitutional significance but also because it is a right affecting the operation of the courts, an area in which this Court has long exercised distinctively far-reaching powers of review. These powers have been exercised in rightful recognition of the special competence with which the constitution endows the courts where matters of judicial access and operation are involved. Whatever deference may be accorded the legislature in dealing with matters such as economic regulation, legislative determinations affecting the operations of courts have always been much more a matter for judicial regulation. The extraordinary competence of the court in judicial matters has been reflected in numerous doctrinal developments, perhaps most notably in the development of safeguards in criminal proceedings over the past decades.

Included in this body of development are the *Griffin*, *Draper*, *Burns* and *Bennett* cases dealing with various aspects of the relationship between indigence and equal protection in the judicial process. The motivating spirit behind these cases is perhaps best summarized in the *Griffin* case where it is said:

> "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has." 351 U. S. at 19.

Equal justice, equal protection of the laws was in those cases applied to ensure that an indigent defendant is not deprived of an appeal, of a transcript for appeal, or of an

opportunity to petition for a writ of habeas corpus. It is of course true that those cases involved criminal proceedings whereas we here speak of civil actions in divorce and eviction proceedings, but there is nothing in *Griffin* and its progeny which confine the doctrines there accepted to criminal cases. We speak here not of rights granted under the Sixth Amendment which pertain to criminal prosecutions exclusively. We speak of the equal protection of the laws which applies alike to civil and criminal causes. Moreover, appellants here seek not some recondite procedural privilege. The appellants in the *Sanks* and *Boddie* cases seek that most fundamental rudiment of due process, a hearing. Whatever doubts one may have about construing the equal protection clause to require that a state provide the poor with legal resources of a more marginal importance to the proper functioning of a judicial process, surely there should be none where what is involved is the bare right to a hearing in matters of critical importance to the individual.

C. *There Is No Justification for the Practices Challenged Herein.*

Thus, Amici contend that the practices challenged herein must be deemed violative of our basic guarantee of equal protection unless it can be shown that they serve some state interest of overriding importance. Amici have already attempted to demonstrate that exclusion of the poor from access to the courts bears no rational relation to the primary purpose served by such access. It remains to consider whether there is any secondary purpose whose service would warrant the foreclosure of indigent litigants. Three such ancillary purposes are commonly advanced in justification. First, it is said in cases of the *Sanks* and *Simmons* variety, that bonds are required to protect the

financial interest of the evicting landlord during the pendency of the eviction proceeding. Of this purported justification, many things may be said. First, there is the question of whether the state may adopt a mode of assuring the landlord's pecuniary interest which forecloses defense of the action. Even were there no other means of securing the landlord's rental interest, there would be substantial doubt as to the validity of any mechanism which assured one party's interests *pendente lite* at the cost of precluding any defense at all by the adverse party. But the ultimate unacceptability of such a defense is made plain by the existence of alternative mechanisms which would secure the landlord's financial interests without precluding the tenants' defense. The landlord's rental interest is adequately served by the requirement that rental payments currently owing be paid to a court-appointed receiver. Such a scheme would protect the landlord while allowing the tenant his day in court.

Also commonly proffered are the somewhat different justifications to the effect that the fees are necessary to deter frivolous litigation and that they are necessary for revenue raising purposes. Turning to the latter justification, one notes first that the fees involved support but a small fraction of the costs of adjudicating marital status in Connecticut and that the revenue raised thereby constitutes an insignificantly small fraction of Connecticut's revenues. This latter fact makes it abundantly clear that it is wholly misleading to speak of the "necessity" of state financing through the imposition of such charges. The State of Connecticut has before it an infinite and bewildering variety of possible levies (none of which are pleasant to the payer, to be sure) to finance its expenditure. Most

of the major revenue-producing alternatives, such as the income tax and the sales tax, do not entail precluding the poor from the exercise of basic civil liberties. The statement that the levies herein challenged are "necessary" means only that the State of Connecticut has chosen to raise revenue in a way which precludes certain poor persons from instituting divorce actions when it could have as easily chosen a tax structure which did not entail such preclusive consequences.

Finally, it is said that the imposition of charges precludes the bringing of frivolous suits which will be brought in the absence of such charges. Passing the unrealistically misanthropic view which underlies such a justification, it should be noted that, whatever the validity of such a justification in other circumstances, it is strikingly inapposite to the matters at hand. In *Sanks* and *Simmons*, we are concerned with tenants *defending* eviction proceedings, rather than with the initiation of litigation. The floodgates are unlikely to be opened by litigants whose very presence in court is a response to an unwelcome offensive by their landlords. Similarly, matrimonial litigation is not often undertaken in a spirit of unrestrained frivolity. As the American Bar Foundation put the point in its investigation of such problems:

> "Some court proceedings, although in the form of litigation, are really not resolutions of disputes, but mere legal formalizations of arrangements worked out between parties nominally in legal conflict with each other. This is true of default matrimonial proceedings—divorce, annulment, separation—and, with certain qualifications, adoptions, 'no asset' bankruptcies, and perhaps certain other proceedings. In this type of case

> the public policy of deterring litigation (by imposing costs and fees as a condition of access to the courts) either does not apply at all, or at most, it applies in much weaker form. Yet costs are involved in such proceedings as in other judicial proceedings, and with similar differential deterrent effects on the poor as compared to others. The result is that a person of means may be able to obtain a legal formalization that a poor man cannot. This discrimination cannot be justified by the public policy of deterring litigation.". "Public Provision for Costs and Expenses of Civil Litigation," Report of the American Bar Foundation, June, 1966, pp. 10-11.

Moreover, whatever the merits of such charges in deterring frivolous litigation, ultimately no system which precludes one-seventh of a nation from access to the courts can be justified as deterrence to occasional frivolity.

This conclusion—that no justification exists for practices which deprive the poor of court access—was recognized in the context of a divorce proceeding by the New York Supreme Court in *Jeffrys v. Jeffrys*, 58 Misc. 2d 1045 (N. Y. Sup. Ct., Kings Co., 1968). There the court found the imposition of preclusively expensive publication costs on the poor a violation of the Equal Protection clause, stating at 1056:

> "Marriage is clearly marked with the public interest. In this state, a marriage cannot be dissolved except by 'due judicial proceedings' (N.Y. Constitution, art. I sec. 9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . This hurdle is an effective barrier to Mrs. Jeffrys' access

to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffrys of that right while affording it to others with money."

For the very same reasons, because of a similar lack of justification, Amici urge that the charges imposed in *Boddie* must fall.

D. *Conclusion of Equal Protection Argument.*

In sum, Amici's position is that the practices challenged herein contravene the equal protection clause of the Fourteenth Amendment because: (i) they bear no rational relation to the primary purposes underlying the creation of court access in eviction and marital proceedings; (ii) they constitute classifications based on poverty, traditionally suspect in this country; (iii) they deprive individuals of a basic civil right; and (iv) there are no ancillary purposes which can justify such practices.

In light of the above, Amici contend that the bond required in *Sauks* and *Simmons* and the charges imposed in *Boddie* constitute invidious discriminations violative of the equal protection clause.

To decide otherwise would render that noble engraving above this Court's pillars a mocking palimpsest wherein the discerning eye could see, beneath what is visible to all, the more revealing inscription: "No paupers allowed."

II.

Requiring court fees or costs of an indigent litigant as a condition to asserting his rights before a court of law deprives him of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

A. *The Right to a Hearing Before a Court of Law Cannot Be Made Dependent on the Ability to Pay Certain Fees or Costs.*

Appellants herein have all been deprived at various points in the litigative process of an opportunity to present their claims before a judicial tribunal. As a result they have been deprived of certain elements of property and liberty without the most basic requisite of due process of law—notice and an opportunity for a hearing. *Schroeder v. New York*, 371 U. S. 208 (1962); *Covey v. Somers*, 351 U. S. 141 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Morgan v. United States*, 304 U. S. 1 (1938); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930); *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915).

In its most literal sense, the right to due process means the right to a hearing. *Hovey v. Elliot*, 167 U. S. 409, 413-14 (1897). If one cannot appear and present evidence and argument in his defense, the chances that he will be dealt with fairly are minimal. Without such safeguards as are provided by a trial which comports with due process, a citizen can be deprived of those things most dear to him through a secretive, farcical proceeding, or without any proceeding at all. (*See, e.g., Thompson v. City of Louisville*, 362 U. S. 199 (1960).)

At a minimum we know that due process mandates some sort of hearing at some time before the taking of life, liberty or property. *Coe v. Armour Fertilizer Works, supra.* Further, notice and hearing must be "aimed at establishing the validity, or at least the probable validity, of [a person's] underlying claim *before* he can be deprived of his property or its unrestricted use." *Sniadach v. Family Finance Corp.*, —— U. S. ——, 89 Sup. Ct. 1820, 1823 (1969). (Emphasis original.)[2]

The hearing must be "fair" and appropriate to the type of proceedings and the individual case.

> "[By] due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and it must give them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U. S. 701, 708."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161-62 (1951). (Frankfurter, J., concurring.)

Furthermore, and this is crucial to the cases at bar, that opportunity must be real. *Brinkerhoff-Faris Trust & Sav-*

---

[2] *Sniadach* invalidated Wisconsin's pre-judgment garnishment statute, under which a summons for the seizure of a defendant debtor's wages was issued by a court based solely on the statements of the creditor's attorney. Any subsequently withheld wages could be regained after a later trial on the merits. The court held that the interim deprivation of wages imposed "tremendous hardship" and could not be imposed without a prior hearing. The requirement is even more imperative when the loss is not temporary, as in *Sniadach*, but permanent and total deprivation of one's dwelling and the pain and suffering caused a family suddenly evicted from its living quarters.

ings Co. v. *Hill*, 281 U. S. 673, 682 (1930). See also *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950), and *Covey* v. *Somers*, 351 U. S. 141 (1956). A nominal opportunity to pursue one's rights can never satisfy the due process clause. And a hearing is nominal when, no matter how just its procedures, one is barred from it by a financial requirement he cannot fulfill. A right which is conditioned upon a circumstance a party cannot meet is in effect no right at all. "Constitutional rights would be of little value if they could be . . . indirectly denied, *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944) . . . or manipulated out of existence." *Harman* v. *Forssenius*, 380 U. S. 528, 540 (1965). See also *Western Union Tele. Co.* v. *Kansas*, 216 U. S. 1 (1909); and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). And particularly invidious are those conditions which are based upon race or class, factors which are fixed beyond the ability of the individual to alter. *Morey* v. *Doud*, 354 U. S. 457 (1957).

As one commentator has written about the very statute at issue in *Sanks* v. *Georgia*:

> "There can be no question that the statute does provide for a hearing on the merits. In this sense, it might be said that a tenant need only avail himself of the opportunity that is provided. But it accomplishes nothing to tell a poor man that he would have an opportunity to defend if he had money. Such an opportunity is meaningless to him. He no more has a practical opportunity to be heard than does a defendant who is not given adequate notice."
>
> Klevens, "Poverty and Equal Access to the Courts: the Constitutionality of Summary Dispossess in Georgia." 20 Stanford L. Rev. 766, 772 (1968).

The Georgia requirement of posting bond in order to defend an action is, in effect, a requirement that the indigent tenant fulfill an impossible condition before he will be afforded his fundamental right to be heard. Since the indigent tenant cannot afford to post the bond, he is being deprived of his absolute right to a trial as guaranteed by the due process clause of the Fourteenth Amendment. The impact of this requirement is made shockingly clear when one considers that only thirteen tenants took advantage of their "opportunity to be heard" in response to 19,000 eviction notices issued in Fulton County, Georgia in 1967. (Opinion below in No. 266, Georgia Civil Court, Fulton County, October 2, 1968.)

Under the Georgia procedure, it is possible and even likely that poor tenants will be evicted without good cause. Suppose a tenant with a month-to-month or year lease diligently pays his rent on time. A landlord may want a tenant to vacate before his lease is up because he wants the building for a higher paying commercial tenant, because he just bought the building and does not want tenants of certain race or religion, or because he has a personal grudge against the tenant, perhaps for reporting a housing code violation. See *Edwards v. Habib*, 397 F. 2d 687 (1968). Knowing that the tenant has no means of providing the required bond, the landlord can file a complaint for eviction and falsely allege that the tenant has failed to pay rent. The tenant who has paid the rent and has receipts to prove it, nevertheless will be evicted, for without the money to provide the bond he cannot demonstrate his innocence at a hearing. As the tenant has no procedural rights, he also has no substantive rights, in spite of what the law may have led him to believe.

Equally in *Boddie v. Connecticut*, No. 265, though the opportunity exists for persons in appellants' marital circumstances to obtain a hearing for an adjudication of divorce, that opportunity is non-existent and unreal to persons who, like appellants, are unable to pay what amounts to an entrance fee.

Nor is the situation substantially different *vis-a-vis* due process in No. 81, *Simmons v. West Haven Housing Authority*, in which indigent defendants are deprived of their right to a hearing on appeal. For the appeal has become an "integral part" of our judicial system, *Griffin v. Illinois*, 351 U. S. 12 (1956), and "the proceedings in the appellate tribunal are to be regarded as a part of the process of law . . . and to be considered in determining any question of alleged deprivation of . . . life or liberty contrary to the Fourteenth Amendment." *Frank v. Mangum*, 237 U. S. 309, 327 (1914). In judging the quality of justice afforded by a particular state system, one must look to the entire course of proceedings in all its courts. *Id.* at 328.

Though the state need not provide any appellate review, when it does so it must afford that review to all commensurate with full constitutional guarantees. *Griffin v. Illinois*, 351 U. S. 12 (1956), *Burns v. Ohio*, 360 U. S. 252 (1959), *Smith v. Bennett*, 365 U. S. 708 (1961); *Lane v. Brown*, 372 U. S. 477 (1963). *Rinaldi v. Yeager*, 384 U. S. 305 (1966). Thus this Court has invalidated various states' attempts to eliminate appeals by indigents through sorting out processes which fall short of a fair judicial determination of the merits of the appeal. *Anders v. California*, 386 U. S. 738 (1967) (appointed counsel refused to prosecute an appeal he determined had no merit); *Lane v. Brown*, *supra* (only public defender could obtain a free transcript

on appeal, and he could refuse to do so for an appeal he deemed without merit); *Draper* v. *Washington*, 372 U. S. 487 (1963) and *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214 (1958) (trial judge could prevent appeals by indigents when he determined their objections to the trial to be without merit).

The requirement of a hearing attaches whenever important rights may be limited by the state. The power of the courts does not cease after trial; judicial mandate is equally powerful upon appeal, and so that mandate must, commensurate with due process, issue only upon opportunity to all for a full hearing.

B. *The Financial Requirements Challenged by Appellants Herein Are an Arbitrary and Unreasonable Restriction Upon the Judicial Process.*

There is a further dimension to the due process clause which requires administration of a judicial system in an even-handed manner, free from the arbitrary or capricious exercise of state power. *Jones* v. *Union Guano Co.*, 264 U. S. 171 (1924); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). In fact, the requirement of a hearing before adjudication of criminal or civil rights and liabilities is simply instrumental and subordinate to the underlying mandate of the Due Process Clause, that:

> "... no State can deprive particular persons, or classes of persons, of equal and impartial justice under law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the Constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual

to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." *Leeper* v. *Texas*, 139 U. S. 462, 468 (1890).

A judicial system which subjects litigants to different treatment based on financial means is indeed subjecting certain of those who come before it "to the arbitrary exercise of the powers of government." By denying to those who cannot afford a surety bond a chance to defend against eviction, at trial or on appeal, or denying the opportunity to file a petition for divorce to those unable to pay the necessary costs, a state is doling out justice on an arbitrary basis, for there is no rational justification in terms of the goals of a judicial system which can justify such distinctions.

This is not to say that all those guarantees which lie within the range of the Equal Protection Clause are simply a reiteration of what is meant by due process of law. It is simply to recognize a minimum requirement of equal justice that is imposed on state judicial systems. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954); *Giozza* v. *Tiernan*, 148 U. S. 657, 662 (1892); *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921):

"It may be that they [due process and equal protection] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous . . . The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon

> inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold."

A system which makes determinations as to the merits of a claim before it, not on the basis of a factual situation, but on the basis of an arbitrary factor wholly external to the issues involved and the laws governing the rights of the parties—"the ability to pay costs," see *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956)—is not providing due process of law.

Nor can a legislature affect the outcome of legal proceedings by imposing irrational burdens upon one party to a lawsuit and not the other. To impose penalties for lack of success which intimidate and effectively deter a party from resorting to the courts, to gain a judgment or to appeal one, is the same as denying access to the courts entirely. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340 (1913), and no process cannot be due process.

C. *Appellants Are Being Deprived of Rights Under the Due Process Clause.*

All the guarantees embodied in due process attach in the cases at bar because the appellants therein are being deprived of liberty and property by arbitrary processes of government.

Whether a leasehold is conceived of as real or personal property (see generally Powell, The Law of Real Property, Vol. 2, §221, pp. 177-188 (1967), the lessee's interest is a substantial property right. *Waskey* v. *Chambers*, 224 U. S. 564, 565 (1912); *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948).

> "Except when he has divested himself of the right to possession, the lessee under a presently existing lease is the owner of a possessory estate and has all the rights which accompany ownership of such an interest. This is true with regard to the lessor as it is with regard to a third person."
>
> American Law of Property, Vol. 1, §3.38, p. 252 (1952).

As to the importance of the liberty to marry and divorce, these are fully examined in Point III, B, *infra*. See also *Williams* v. *North Carolina*, 325 U. S. 226, 230 (1944).

Nor can a state deprive a citizen of his right to prosecute or defend an action without due process.

> "[A] vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice." *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882).

When a state affords the right to a divorce under certain conditions, it cannot deprive certain classes of persons of that right arbitrarily. For a right to a cause of action is protected by due process. *Forbes* v. *Board of Commissioners*, 258 U. S. 338 (1922), particularly when the action involves a subject as important to both the individual and society as marriage and divorce. *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Maynard* v. *Hill*, 125 U. S. 190 (1888).

No less protected is the right to defend one's property against litigious attacks thereon. *Holt* v. *Virginia*, 381 U. S. 131 (1965); *Pritchard* v. *Norton*, *supra*. The state of Georgia could not enact a statute providing that the fact of payment is no defense to an eviction action based on alleged non-payment. Such a proposition is absurd. Yet this is exactly what Georgia and Connecticut have done by depriving the indigent tenant of a hearing in which he can present his defenses.

III.

Conditioning access to the Courts on posting bond or fees deprives appellants of freedom of expression and association and the right to petition the Government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution.

A. *Access to the Courts Is a Form of Expression and a Means of Petitioning the Government for Redress of Grievances Which Is Protected by the First Amendment.*

That the First and Fourteenth Amendments bar a state from imposing barriers to litigation is made clear by the series of cases decided by this Court involving attempts to inhibit litigation through restriction on members of the bar. The most definitive of these is *NAACP* v. *Button*, 371 U. S. 415 (1962)[3] in which the Court upheld the right of the NAACP to direct litigation and offer the services of and compensation to attorneys for litigating civil rights cases on behalf of Negroes in Virginia, against the state's accusation of barratry and solicitation of legal business.

Button first explicitly recognizes the importance of litigation as a source of political change.

> "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression." 371 U. S. at 429.

---

[3] See also *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U. S. 1 (1964) and *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U. S. 217 (1967).

Civil rights litigation is only the most prominent example of the use of the courts, particularly by minorities, whether racial or ideological, to gain a voice in governmental decision-making. Those with unpopular political beliefs (*Schenck* v. *United States*, 249 U. S. 47 (1919); *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Baggett* v. *Bullett*, 377 U. S. 360 (1964)); or the esthetically unorthodox (*Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Freedman* v. *Maryland*, 380 U. S. 51 (1965)); or adherents of minority religious sects (*Engel* v. *Vitale*, 370 U. S. 421 (1962); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105 (1943)); to name just a few, have sought through the judicial system to assert rights and gain protections which they were powerless to assert or enjoy through the ballot box or other means of influencing their government.

In recent years, the poor have with increasing frequency resorted to the courts to gain influence over those political processes from which they are otherwise cut off by the more affluent majority, with some success in their attempts to enforce existing law or to change that law. See, for example, *Shapiro* v. *Thompson*, *supra*; *King* v. *Smith*, 392 U. S. 309 (1968) (invalidating Alabama's refusal of welfare benefits to children whose mother resided with a man not her husband); *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1969) (invalidating maximum limit on Aid to Dependent Children grants regardless of family size and need). In other instances, the poor have successfully fought procedural limitations imposed by the judicial system which curtail their substantive rights, just as appellants herein seek to do. Thus exhaustion of administrative remedies has been held not to be required in a federal action under 42 U. S. C. §1938 (*Damico* v. *State of California*, 389 U. S. 416 (1967)). See also *Holmes* v. *New York City Housing*

Authority, 398 F. 2d 262 (2d Cir. 1968); a hearing commensurate with due process must be afforded persons terminated from public assistance (*Kelly* v. *Wyman,* 294 F. Supp. 887 (S. D. N. Y. 1968), probable jurisdiction noted, April 21, 1969, 37 U. S. L. W. 3399 (1969).

Pre-judgment garnishment, a process which greatly facilitated creditor interests and seriously injured poor debtors, was struck down by this Court, *Sniadach* v. *Family Finance Corp.,* —— U. S. ——, 89 S. Ct. 1820 (1969). In the field of landlord and tenant law, too, the poor have secured a measure of relief from arbitrary procedures. *Edwards* v. *Habib,* 397 F. 2d 687 (1968) invalidated retaliatory evictions and permitted a wholly new defense to be raised in summary eviction proceedings.[4] Also noteworthy are *Thorpe* v. *Durham Housing Authority,* 380 U. S. 670 (1967), —— U. S. ——, 37 U. S. L. W. 4068 (1969) dealing with the right to notice and a hearing before eviction from public housing; and various efforts to establish the doctrine of constructive eviction as a defense in actions for rent. *Reste Realty Corp.* v. *Jay M. Cooper* (N. J. Supreme Court No. A-45, March 17, 1969), *Pasqua* v. *DeMarchi* (N. Y. Sup. Ct. App. Div. 4th Dept. January 1969).

And see *Hackin* v. *Arizona,* 389 U. S. 143, 145 (1967) (Douglas dissenting). Cost requirements severely restrict the provision of legal services to the poor, because funds are simply unavailable to defray such expenses, as is indicated in the Appendix hereto.

The judicial system serves as a primary arbiter of disputes, both between private citizens and citizens and the

[4] The plaintiffs in *Edwards* were permitted to pay rent monthly into court, in lieu of a surety bond, in order to appeal an adverse trial court decision. The appeal resulted in the establishment of the doctrine of retaliatory evictions.

state. Men establish governments to provide order, and so governments must provide the mechanisms for the orderly and peaceful redress of grievances. It is precisely these mechanisms which the First Amendment is designed to make available to all citizens. To deny access to the courts to the poor is to relegate a class to the use of force to achieve its needs.

What is more, the fact that a suit may be nominally between private parties should be of no moment, for ostensibly private suits deeply implicate the state. Thus, in a matrimonial action, frequently the proceeding involves only one of the married parties and the state, the other spouse being beyond reach. The eviction proceedings herein challenged of course involve the state, which participated as landlord and evictor, so that one petitions the government for grievances perpetrated by it in the fullest sense. But even if this were not true, even if the landlord had been a private party, the right to petition the government for the redress of grievances would still obtain. It would be idle naivety to pretend that, in the middle of the twentieth century, a conflict between landlord and tenant is a purely private affair. That conflict, symptomatic of the schism between the privileged and the poor, is intimately bound up with state exertions. To deny the poor equal protection because eviction proceedings typically do not involve the government as landlord and so are private conflicts would be to ignore the widely perceived fact that the division between private and public is no longer so clear and to give credence to the charge of judicial complicity in the most oppressive form of establishmentarianism. Rather, it must be clearly held that rich and poor alike are entitled to petition the government for the redress of grievances and to obtain impartial justice.

Moreover, the status of litigation as protected activity is not mitigated when purely private causes of action are asserted. ". . . [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U. S. 217, 223 (1967). The right to petition the government includes the right to assert private demands which nevertheless depend for fulfillment on some form of government action, such as property rights or the right to a divorce when certain statutory requirements are met, just as the plaintiffs in the *Railroad Trainmen* and *United Mine Workers* cases were protected in their pursuit of benefits due them under various workmen's compensation laws.

B. *The Imposition of Costs for Divorce Proceedings Inhibits Appellants' Exercise of Their Freedom of Association and Right to Marry and Procreate.*

In addition to inhibiting their right to petition the government for the redress of grievances, costs imposed in divorce proceedings strike at the appellants' First Amendment right to associate in marriage and family, free from arbitrary interference by the state. Marriage and the family are associations protected against the Federal Government by the First and against the states by the Fourteenth Amendment. See, *inter alia, Skinner* v. *Oklahoma, supra, Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Indeed, of the many associations protected by the First Amendment, the family is in some ways the most fundamental. It stands at the very core of that network of associations upon which our pluralist political structure is based. It has long been recognized that the protections of the First Amendment extend far beyond the simple politi-

cal assembly and embrace the whole range of associations forming this network, including schools, churches, and families as well as political parties. Indeed respect for the integrity of the family has long been one of hallmarks of American constitutional democracy, one of the critical factors distinguishing our form of government from totalitarian regimes.

The right to marry and have children is among the "basic civil rights of man . . . fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U. S. at 541. The state cannot be permitted to condition marital rights on the basis of invidious classifications. *Loving* v. *Virginia,* 388 U. S. 1 (1967); nor regulate in a discriminatory fashion matter traditionally left within the scope of the family association. *Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Griswold* v. *Connecticut, supra.* Because of the state's historically intimate involvement in the preservation of the stability of the family as an institution, *Maynard* v. *Hill,* 125 U. S. 190 (1888), only the state can grant to appellants herein the freedom from an unsatisfactory and essentially fictional marriage, and the opportunity to enter into a new union. Plaintiffs have no remedy outside of court, and are prevented from ever entering into a marital association in the true sense, or from establishing a home and family in fulfillment of man's most basic instincts. Unable to afford the costs of a divorce, appellants are bound to a union that has for all purposes ceased to exist, a situation which in many cases is the cause of their indigence and public dependence in the first place. The state offers freedom from such a union, but only to those who can pay. Surely, this is not a reasonable regulation of the constitutionally protected freedom of association.

CONCLUSION

The Court should hold the financial requirements at issue in the three cases at bar violative of the Fourteenth Amendment in that they unlawfully discriminate against indigent persons and permit access to the courts and a judicial hearing only to those of financial ability. The decisions below should be reversed.

Respectfully submitted,

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

JOHN DEWITT GREGORY
NAPOLEON B. WILLIAMS
80 William Street
New York, N. Y. 10038

Attorneys for Community Action for Legal Services, Inc.

APPENDIX

APPENDIX

Publicly Funded Programs Providing Legal Services to the Poor Cannot Supply Bonds for Litigation Purposes

At the request of the Center for Social Welfare Policy and Law, Community Action for Legal Services undertook a survey to determine the experiences of the various legal services programs across the country with respect to requirements for posting bonds in civil cases brought on behalf of indigents. Pursuant to this undertaking, approximately thirty legal services programs, representing thirty states, were mailed a form letter and questionnaire (included within this appendix) requesting information in regards to the availability of legal services for the poor in situations requiring the posting of a bond. Insufficient time made it impossible for all but a few programs to respond. Precise statistical tabulation of these responses was impossible. The responses obtained, however, did outline the effects which the bond requirements posed to the successful operation of a legal services program.

Few of the programs actually posted bonds for litigation purposes. Partly, this is so because their programs decided to forego the suit because of the expenses and difficulties involved, and partly because some states have permitted waiver of the requirement. New York Civil Practice Law and Rule, §5519 (a) is illustrative on the latter point. To obtain, upon appeal, a stay of enforcement of a money judgment *without a court order,* the appellant is required to file an undertaking securing the judgment below. However, subsection (c) of Section 5519 allows a litigant an opportunity to obtain a stay by court order. Presumably this is without posting an undertaking, although the statute

is not very clear on this point. That waivers have not been possible in all such cases where states have similar provisions is confirmed by the enclosed statements from legal services attorneys that they have terminated hundreds of cases as a consequence of the bond requirement.

From this limited response, it was quite evident that legal services programs were unable to budget funds for the cost of procuring bonds. This result is in line with the experience in New York City. Funds from the Office of Economic Opportunity simply are not sufficient to pay for bonds. The money for bonds invariably comes from general litigation funds. The availability of money is a very acute problem for the legal services program. The OEO News Summary of the War on Poverty, dated July 15, 1969, states that:

> "Two hundred thirty one *Legal Services Programs* have been helped in fiscal 1968 at a Federal cost of $34,739,443." News Summary, p. 5.

Certainly, thirty five million dollars is a small figure to finance the entire cost of civil litigation for the poor of the nation. If New York City's experience is a guide to the general financial condition of other legal services programs in the country, and we believe that it is, then there is a rather straightforward way to account for the minute sums available for the costs of bonds.

Here as elsewhere, legal services programs are grossly understaffed and, as a direct result of the understaffing, are encountering a severe caseload problem. This strain on manpower increases the need for additional lawyers and clerical workers. In New York City, there are ten legal services programs, operating under Community Action for

Legal Services. Each of these programs has requested additional funds for increases in staff and staff salaries. The pressures on the programs, in terms of the strain of their budgets, can best be seen through the operation of Mobilization for Youth, one of the programs in New York. Mobilization for Youth, or MFY as it is popularly called, employs twenty-one attorneys. These 21 attorneys are responsible for providing legal services to the poor in an area extending from the lower east side of Manhattan, near East 3rd St., to the west side, near W. 102nd St. The use of 21 lawyers to cover such a vast area is conceivable only in a poverty program. Starting salaries for lawyers on the MFY staff are approximately $8600 as compared to starting salaries of $15,000-$18,000 for lawyers in Wall St. law firms. MFY has a proposed budget of $835,690 for 1969-1970, personnel costs, including salaries and fringe benefits, account for $665,025, or approximately 80% of the budget. In the past five months, ending on May, 1969, MFY reported an intake of 2,848 new cases, or an average of 136 new cases per attorney. Of this figure, 1,594 cases were closed or withdrawn, leaving 4,320 cases, or 206 cases per attorney, still pending.

These conditions are representative of the problems faced by legal services programs in the City and in the United States. To permit precious funds to be diverted away from the main goal of obtaining more attorneys in order to meet the costs of posting bonds would be a disservice to the poor who have come to rely upon the legal services attorney.

ALABAMA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   The CAP Agency has a general fund for numerous purposes out of which they supply us bond money. However, we have no special fund designated specifically for bonds.

2. Amount expended for costs above:

   We have one case dealing with the double-rent bond and unlawful detainer suits and have bonded $624.00; we have appealed the same case on a $100.00 bond.

   In suits for preliminary injunctions, we have thus far spent $1500.00.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   The Birmingham Legal Services Program was begun in January, 1969. At the time our budget was drawn, I assume that the necessity of bond money was not foreseen. However, let me clearly point out that the CAP Agency has been most generous with us. The money comes from them and not out of Legal Services budget.

4. Number of cases handled each month requiring a bond:

   In the last six (6) months, we have dealt with four cases requiring a bond.

5. Number of cases terminated because of inability to procure a bond: None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state. (Attached)

A. Preliminary Injunctions; B. Appeal of unlawful detainer suits from General Sessions to Circuit Court; C. Detinue Suits in order to retain property; D. Appeal bonds in all appeal cases, in the amount guaranteeing the court costs accrued and the estimated court costs in the higher court, as well as guaranteeing the amount of judgment in the lower court.

(These are the only situations I am familiar with personally.)

LINDA S. LOMBARD
Legal Services Program Ensley Office
Birmingham, Alabama

AFFIDAVIT

It is most disturbing that a tenant can be evicted only five days after judgment is taken in an unlawful detainer suit. This procedure makes it most difficult to contest the filing of the double-rent bond when we wish to appeal the judgment to the Circuit Court. By the time I could get a hearing on a motion to suspend bond, or on a show-cause motion, the tenant would be out in the street.

It has thus far been impossible for me to contest the double-rent bond and the appeal bond required in unlawful detainer (eviction) cases, without detriment to my client.

Linda S. Lombard
Staff Attorney
Ensley Office
Legal Services Program

WITNESS: Virginia Hamilton

ARIZONA

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No funds allocated under our federal grants for bonds.

4. Number of cases handled each month requiring a bond:

   Approximately 12 per month.

5. Number of cases terminated because of inability to procure a bond:

   Approximately 70 per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   It has in some cases. Affidavit attached.

7. Statement of situations requiring the posting of a bond in your state:

The situations most commonly affecting clients of the Maricopa County Legal Aid Society, Phoenix, Arizona, are, in the order of importance and frequency:

(1) Bond required to appeal a judgment from the Justice of the Peace Court to the Superior Court for trial de novo.

(2) Various appeal bonds.

Russell G. Sheley, Jr.
Maricopa County Legal Aid Society
Phoenix, Arizona

AFFIDAVIT

STATE OF ARIZONA,
COUNTY OF MARICOPA, *ss.*:

RUSSELL G. SHELEY, JR., Senior Staff Attorney, Maricopa County Legal Aid Society, Phoenix, Arizona, upon his oath deposes and says:

Based upon his personal experience, and upon information from other attorneys of this organization, which information he deems reliable, the necessity of posting bonds and the financial inability of a client to do so, sometimes prevents effective representation of the client.

RUSSELL G. SHELEY, JR.

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1969.

Conception C. Padilla
Notary Public

My Commission Expires:

August 25, 1972

COLORADO

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Our office has no specific fund set aside for the cost of posting bonds. Our grant only allows a general litigation fund out of which we must provide for depositions, court costs when we cannot get through a motion to sue in forma pauperis (filing fees, jury fees, subpoena fees, etc.) and the client really cannot afford these costs.

2. Amount expended for costs above:

Only about $50, to $100. because cannot deplete the fund for the many other litigation costs which must be met.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

Very simply stated, the budget grants are not adequate.

4. Number of cases handled each month requiring a bond:

We cannot answer this question accurately. In the last month we have handled ten eviction cases by filing very elaborate pleadings. Upon the filing of our answers, the opposing parties have made offers which upon communication to our clients, the clients have found attractive and settled.

5. Number of cases terminated because of inability to procure a bond:

Again, this number is not ascertainable. If the bond requirement was not there, perhaps our clients would not find the settlement offers so attractive. Landlord-tenant law in Colorado is medieval in character. Our legislative efforts this year met much opposition and the bill was killed. Consequently judge-made law is the only avenue at present; but the cases slip from us because of the practical judgments our clients find it necessary to make.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state.

In Colorado "evictions" are commenced judicially pursuant to CRS (1963) 58-1-10. There is no posting of a bond pre-condition necessary for either party at trial. There are requirements of notice. CRS (1963) 58-1-7 described that notice in writing within fixed time periods according to the nature of the tenancy is necessary. This is for termination other than for non-payment of rent. Evictions for non-payment of rent are processed pursuant to CRS (1963) 58-1-8. Jurisdiction of the Courts is described in CRS (1963) 58-1-9, revision in Vol. 9 of CRS.

In Colorado, however, CRS (1963) 58-1-4 does provide that if either party requests a delay in trial longer than five days, it is within the discretion of the court upon good cause shown to require the posting of bond.

On appeal, CRS (L. 64) 58-1-18 requires the posting of a bond for all costs and damages which may accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, CRS (L. 64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

AFFIDAVIT

STATE OF COLORADO,
CITY AND COUNTY OF DENVER, *ss.*:

TO WHOM IT MAY CONCERN:

I, RICHARD F. HENNESSEY, having been duly sworn, depose and say that:

1. I received a Doctor of Jurisprudence Degree from the Notre Dame Law School, University of Notre Dame, Notre Dame, Indiana, and thereafter received a Reginald Heber Smith Community Lawyer Fellowship from the University of Pennsylvania Law School for the purpose of study of the legal problems of the poor and engaging in legal services to the poor and disadvantaged.

2. I am a member of the Bar of the State of Colorado and have been an attorney for the Legal Aid Society of Metropolitan Denver, 1375 Delaware Street, Denver, Colorado 80204, for one year. During this time, I have been working solely with providing legal counsel and representation to persons who qualify for legal services and who are therefore, by definition, destitute.

3. In Colorado, C.R.S. (1963) 58-1-4 provides that if either party to a suit for unlawful possession of land requests a delay in trial longer than five days after the answer is due (which is five days after service of summons and complaint), it is within the discretion of the court upon good cause shown to require the posting of bond. On appeal, C.R.S. (L. '64) 58-1-18 requires the posting of a bond for all costs and damages which *may* accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, C.R.S. (L. '64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

4. I have represented numerous persons, who, because of their poverty, were not able to plan for, in pursuing their judicial claims, the posting of bond in cases covered by the statutes mentioned in paragraph 3 above.

5. The Legal Aid Society of Metropolitan Denver does not have funds available for the posting of such bonds.

6. Due to these requirements of posting bond, I have not been able to give effective legal counsel and representation to my clients in diligently pursuing claims which are meritorious and just.

RICHARD F. HENNESSEY

Subscribed and sworn to before me this 26th day of June, 1969.

Merlyn H. Kinchelow
Notary Public

My commission expires
November 17, 1971

INDIANA

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Approximately $500.00 is allocated for litigation expenses of which bonds are included.

2. Amount expended for costs above:

Approximately $100.00 per year.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

More funds are not budgeted for the cost of bonds because the O.E.O. has not increased our budget to allow for litigation cost.

4. Number of cases handled each month requiring a bond:

Approximately 15 cases each month require a bond.

5. Number of cases terminated because of inability to procure a bond:

Almost every case that requires a bond is terminated due to the inability to procure a bond.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state:

Briefly they are as follows:

a. In an eviction action, if the plaintiff files an affidavit for immediate possession and a writ for possession the defendant is required to post a bond under Burns Indiana Statutes Annotated 3-1306. The tenant failing to post a bond will be evicted.

b. A bond is required before a court enters a temporary restraining order on temporary injunction pursuant to Burns Indiana Statute 3-2107.

c. A bond is not required to file an appeal, however, a bond is required in order to stay the enforcement of any judgment or interlocutory order, Supreme Court Rule 2-3.

All of the above bonds are required and if a waiver is not granted under the statute or rules of the Indiana Supreme Court.

AFFIDAVIT

STATE OF INDIANA)
COUNTY OF LAKE)

I, J. ROBERT MIERTSCHIN, JR., first being duly sworn under oath depose and say:

1. That I am an attorney for the Legal Aid Society of Gary, Inc., Gary, Indiana.

2. That the requirements of posting bonds has been a detriment to our clients.

3. That Legal Aid cliental do not have the funds to provide for a bond and are thereby prohibited effective representation and immediate relief.

Affiant, verily believes that the foregoing is true and accurate to the best of his knowledge.

J. Robert Miertschin, Jr.
Legal Aid Society of Gary, Inc.
738 Broadway, Gary, Indiana

Subscribed and sworn to before this ..... day of July, 1969.

Nancy Marie McQuen
Notary Public

My Commission Expires:

August 22, 1972

IOWA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $2,000 lump sum for all litigation costs.

2. Amount expended for costs above:

   100%.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   Total budget is too small to increase this cost.

4. Number of cases handled each month requiring a bond:

   6-7 per year.

5. Number of cases terminated because of inability to procure a bond:

   We have no figures on this, would guess several per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   No Affidavit.

7. Statement of situations requiring the posting of a bond in your state:

   Replevin; Appeal from Summary Eviction.

Duane E. Woodworth, Director
Black Hawk County Legal Aid Society
Waterloo, Iowa

LOUISIANA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $5,000 for court costs. There is no breakdown of types of court costs, such as bankruptcy fees, divorce fees, etc.

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   O.E.O. restrictions and needs in other areas for more funds.

4. Number of cases handled each month requiring a bond:

   None

5. Number of cases terminated because of inability to procure a bond:

   Unknown—neighborhood attorneys take position that procedures on appeal, particularly bond requirements, are so onerous that appeals are, as a practical matter, nonexistent.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

See attached memorandum. Memorandum is written as an advocate's presentation. The arguments put forth have never been successfully raised in Louisiana.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, a Notary, appeared the undersigned, JEFFREY B. SCHWARTZ, who declared under oath that:

1. I am a staff attorney with the New Orleans Legal Assistance Corporation, an OEO-funded legal services office rendering free legal advice and services to the poor.

2. The New Orleans Legal Assistance Corporation (NOLAC) has five neighborhood offices and one main office with a complement of nine full time attorneys.

3. NOLAC accepts on the average about sixty or seventy cases a year involving evictions by a landlord of a tenant-client.

4. Although the records of NOLAC do not reveal how many of these cases were actually defended by NOLAC attorneys in summary state eviction proceedings, personal familiarity with these cases leads to an estimate that a large portion of the sixty or seventy cases did involve attempted defenses, a high proportion being unsuccessful, in state court.

5. NOLAC attorneys have *never* appealed a judgment of eviction by the City Court.

6. The reason for failure to appeal in any case, even though in some instances the attorney does believe that there is cause for a reversal of the lower court decision of eviction, is the onerous requirements for taking an appeal.

7. Primary among these onerous requirements for the indigent clients of NOLAC is the requirement that the tenant-appellant post security in sufficient amount to protect the landlord against all damages the landlord may sustain as a result of the appeal. LSA-C.C.P. Art. 4735. Being indigent, NOLAC's clients are unable to post the security for damage and consequently, are effectively prohibited from appealing a decision of eviction.

JEFFREY B. SCHWARTZ
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana

Sworn to and subscribed before me
this 23rd day of July 1969.

EARL J. AMEDEE
Notary Public

NEW ORLEANS LEGAL ASSISTANCE
CORPORATION
605 CARONDELET BUILDING
NEW ORLEANS, LA. 70130

MEMORANDUM

Reform in the area of landlord-tenant relations is going to require defense at the trial level and appeals if necessary. In the event of an order to vacate, the initial concern must be to maintain the client in possession. Once the tenant vacates the premises, the question of his *right* to possession of the premises becomes moot. (Of course, the client's leaving the premises does not affect any affirmative actions for damages such as a suit in tort.)

In an eviction suit, the procedures to obtain a suspensive appeal are onerous and must be carefully complied with. LSA-C.C.P. Art. 4735. The necessary procedures are:

1. A sworn answer by the defendant to the rule;

2. The pleading in the answer of an affirmative defense entitling defendant to retain possession of the premises; and

3. Within 24 hours after the rendition of the judgment of eviction,

   (a) Apply for the appeal

   (b) File appeal bonds.

Although cumbersome and sticky, the only one of these requirements that presents a substantial burden, is the furnishing of an appeal bond. Article 4735 provides,

> "The amount of the suspensive appeal bond shall be determined by the court in an amount sufficient to protect the appellee against all such damages as he may sustain as a result of the appeal."

The possible damages sustainable as a result of the appeal are as follows:

1. Loss of use of premises from date of judgment by trial court until date of final appellate judgment by the appellate court.

2. Cost of the appeal.

Considering the second point as to the cost of appeal first, it is clear that a person entitled to proceed in forma pauperis under Article 5185 is entitled to a devolutive appeal and to apply for supervisory writs without cost. LSA-C.C.P. 5185. Article 5185 goes on to state, however, that such an indigent

> "is not entitled to a suspensive appeal, or to an order or judgment required by law to be conditioned on his furnishing security other than for costs, unless he furnishes the necessary security therefor."

The case law makes it clear that the portion of a bond relating to the costs of the appeal as opposed to security for damages is not required of an indigent. See comment (f) to Article 2124 and cases cited therein. Thus, our clients do not have to file bond to cover the costs of an appeal.

The remaining point as to a bond for damages suffered during the pendency of the appeal is more difficult to deal with. Article 2124 states the security be furnished for an appeal. The security to be furnished for a suspensive appeal is as follows:

"(1) * * *;

(2) when the judgment distributes a fund in custodia legis, only security sufficient to secure the payment of costs is required; and

(3) in all other cases, the security shall be fixed by the trial court at an amount sufficient to assure the satisfaction of the judgment, together with damages for the delay resulting from the suspension of the execution."

Since the judgment is possession of the premises, there appears to be no danger that if the appeal is unsuccessful, the premises will not be delivered. The only damage, therefore, is due to the delay. This will probably be measured by the monthly rent being paid, though allegations of additional damage might be encountered.

The most desirable procedure from our client's point of view, if this becomes the ultimate issue in controversy as to the appeal bond, is to pay the monthly rental periodically into court as it accrues. This arrangement has the advantage of leverage on the lessor to appeal and to pursue the matter without delay yet still affords him opportunity to seek dissolution of suspensive appeal should lessee fail to pay. The order for a suspensive appeal could be so framed.

It should be noted in making the argument that periodic payment in court of the accrued rent is sufficient, that comment (c) to Article 2124 states that,

"Subparagraph 3 . . . is taken in principal from Fed. Rule 73(d). It is flexible in that it gives the court a wide discretion in fixing the bond in cases not involving a money judgment."

Another argument, that is appealing to me, (for saying) that no suspensive appeal bond is appropriate is that the periodic payment of the accrued rent into court constitutes, under subparagraph 2 above, a custodia legis. Therefore, under the prevailing law no appeal bond for damages is necessary. See paragraph (f) of comments to Article 2124.

It should be argued, that the requirement of any appeal bond beyond the periodic payment into court of the accrued rent is in violation of both State Constitution, Article I, §§2&6, (due process and open access) and the United States Constitution, the Equal Protection Clause provision of the Fourteenth Amendment because the security effectively bars indigents from appealing. *Griffin* v. *Illinois; Williams* v. *Shaffer* (Douglas dissenting).

MAINE

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Pine Tree Legal Assistance, Inc. has no specific moneys allocated for the cost of bonds but pays for those few bonds which we do file from our general court cost fund. As far as I know we have handled very few cases requiring the posting of a bond and have terminated none because of inability to procure a bond.

Me. Rev. Stat. Ann. tit. 14, §1903 (1964) requires the posting of a bond upon an appeal taken from the District Court if the appellee so requests. However, there is no bond required for appeal to the Law Court, the highest court in Maine, from the Superior Court which is the higher of the two trial courts in the State. Me. R. Civ.

P. 62 c. However, the civil rule for the issuance for a restraining order or preliminary injunction requires the giving of security by the applicant therefore. Me. R. Civ. P. 65 c.

I hope this will be sufficient for your purposes, and we are, of course, hoping that there will be a favorable decision in the Simmons case. It would be much appreciated if you could forward to us a copy of the amicus brief which you will file in that case.

July 8, 1969

Robert Edmont Mittel
Director Test Case Unit
Pine Tree Legal Assistance, Inc.
Portland, Maine

MICHIGAN

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No provision in our funding for bonds.

4. Number of cases handled each month requiring a bond:

   15

5. Number of cases terminated because of inability to procure a bond:

   35 to date this year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

   All of the 35 cases dropped before appeal for lack of bond were appeals from landlord-tenant court, where waiver was requested and denied, and offers to pay current rentals were refused as bond. Michigan law formerly required the posting of 9 months rent as bond on *appeal*. New statute effective October, 1968 changed that requirement to reasonable bond. M.S.A. §27A.5670 Landlord-tenant division judges have consistently construed this to require a cash deposit in the amount of the judgment below or more in spite of Common Pleas instructions reiterating the statutory language. Circuit court judges usually on appeal will accept paying of current rentals into court as proper bond.

INHIBITION ON JURY TRIAL

In Revised Rules of the Common Pleas Court of Detroit, Landlord-Tenant Division, effective May 15, 1969,

a tenant must pay current rentals into escrow if he demands a jury trial and if said trial cannot be held "forthwith." Rule 7. This court-rule imposed escrow provision operates as a bond to secure the landlord's claim for rent before a tenant may obtain a jury trial. In spite of Common Pleas instructions to the contrary, Landlord-Tenant Division judges construe "current" rentals to be all rent claimed.

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

MAX L. HARDEMAN, being duly sworn deposes and says that for the past year he has served as rent strike Co-ordinator for Neighborhood Legal Services in Detroit, *Michigan.*

Deponent says further that there is a bond requirement for appealing judgments from our local "eviction court" (Landlord-Tenant Court).

Deponent says further that even when the bond requirement has been met that clerks of the "Local eviction court" have refused to file the bond.

Deponent says further that the bond may be satisfied by securing sureties. That when personal sureties are obtained it is necessary for them to take an oath before a judge of that Court. That deponent has been informed and believes that the judges of that Court have refused to administer said oath when personal sureties have appeared before them and requested it.

Deponent says further that many of these defendants receive no notice of the Court proceedings until they are over.

Depohent says further that the necessity for posting bonds coupled with the lack of notice of the Court proceedings prevents many defendants from ever having a day in Court.

Further deponent saith not.

MAX L. HARDEMAN

Dated: July 25, 1969

Subscribed and sworn to before me
this 25th day of July, 1969.

LORAL D. VIGLIOTTI, Notary Public
County of Wayne, State of Michigan
My Commission Expires: Dec. 9, 1972

MISSISSIPPI

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Few of our clients pay rent, and evictions in rural areas are not frequent; so it is hard to draw any conclusions.

M. B. Trister
North Mississippi Rural Legal Services
Oxford, Mississippi

NORTH CAROLINA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Letter July 4, 1969:

In answer to your letter of June 19, 1969, we regret to report that our Housing Division, as such, is only a few weeks old and we have done no trial work in this area as of this time. However, we are working on such a case and obtained a brief used by the Legal Aid office in Charlotte, North Carolina, to further our efforts. I thought you might be interested in seeing the part of the brief dealing with the constitutionality of our bond statute, NCGS §42-34. If someone could benefit from this, please pass it along.

In order to appeal from a summary ejectment, NCGS requires that:

> "... but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an under-

taking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land."

At present this statute is still valid as it has not gone to the North Carolina Supreme Court. There was no appeal in the *Lessie Mae Tucker* v. *Bumgardner* case.

I hope this information will be of some value to you.

Bill Marshall
Housing Division
The Legal Aid Society of Forsyth County
Winston-Salem, North Carolina

TEXAS

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

   None.

2. Amount expended for costs above:

   N/A

3. Short statement explaining why more funds are not budgeted for the costs of bonds:

   N/A

4. Number of cases handled each month requiring a bond:

   One or two.

5. Number of cases terminated because of inability to procure a bond:

   None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   N/A

7. Statement of situations requiring the posting of a bond in your state.

   Can usually be waived if it is a problem.

Frank P. Christian, Director
Bexar County Legal Aid Association
San Antonio, Texas

SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1969

Rector Simmons, Jr., et ux., Appellants, *v.* West Haven Housing Authority. | On Appeal From the Appellate Division of the Circuit Court of Connecticut.

[June 29, 1970]

Per Curiam.

We noted probable jurisdiction in this case to decide whether § 52-542 of the Connecticut General Statutes[1] requiring a bond for the protection of his landlord from a tenant who wished to appeal from a judgment in a summary eviction proceeding, offends either the Due Process or Equal Protection Clauses of the Fourteenth

[1] At the time of the decisions below in this case, § 52-542 provided:

"Bond on appeal; stay of execution. When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-543 to 52-548, inclusive."

This version of § 52-542 has been repealed and a revision substituted effective as of October 1, 1969, see (1969) Conn. Pub. Acts No. 296.

Amendment if applied to foreclose appellate review for those too poor to post the bond, 394 U. S. 957 (1969).

Because of an ambiguity in the record concerning the underlying reason these appellants were denied an opportunity to appeal the trial court's judgment ordering that they be evicted, we now conclude that this appeal should be dismissed, *DeBacker* v. *Brainard*, 396 U. S. 28 (1969); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947).

After unsuccessfully litigating in the trial court a summary eviction proceeding begun by their landlords, appellants moved in the trial court for a waiver of the bond requirement so that they might appeal. The trial court, apparently of the view that it had the power to waive the statutory bond requirement in an appropriate case, denied appellant's motion on a finding that "this appeal is being taken for the purpose of delay." App. 23. Appellants sought review of the trial court's denial of their motion in the Connecticut Circuit Court, and that court denied review and dismissed appellant's appeal. It is unclear from that court's opinion, however, whether it thought the bond requirement of § 52–542 left no room for a waiver,[2] or instead based its refusal to hear

[2] The opinion states in one place that "[a] sufficient bond with surety is essential to a valid appeal." App. 58. The Court also said that "[w]ant of a bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal." App. 60. At oral argument here, however, the State of Connecticut, appearing as *amicus curiae*, contended that the statutory bond requirement could, in an appropriate case, be waived. The opinion of the Circuit Court did not expressly pass on this issue, which it appears was not settled under Connecticut law at the time of its decision. A subsequent decision of a Connecticut circuit court suggests that the bond requirement is an absolute and necessary condition for an appeal, but it too did not consider the waiver contention made by the State before this Court, see *Housing Authority* v. *Jones*, 5 Conn. Cir. 350, 252 A. 2d 465 (1968). Moreover, this decision did not consider the effect of the 1969 amendment to § 52–542, see n. 1, *supra*.

appellant's appeal in part on the trial court's finding—cited it the Circuit Court's opinion [3]—that the appeal before it was taken only for purposes of delay. 5 Conn. Cir. 282, 250 A. 2d 527 (1968). Appellant's petition to the Supreme Court of Connecticut to certify the case for review was declined.

In these circumstances, we deem it inappropriate for this Court to decide the constitutional issue tendered by appellants.

Dismissed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

---

[3] The opinion states in another place:

"On January 19, 1968, the trial court held a special hearing on the defendant's application for waiver of security on appeal. The court found that no rent had been paid since May 1, 1967, nor had the defendants offered to pay any part of the rent due; that the record contained 'dilatory tactics, and [was] loaded with defenses interposed to delay and obstruct the summary process action'; and that the 'appeal is being taken for the purpose of delay.' Accordingly, the court denied the application for waiver of security on appeal." App. 57.

The same Circuit Court, in later granting the landlord's motion for an order terminating a stay of execution of the eviction order, expressly affirmed the trial court's findings saying:

"We have before us the entire file in the case. As we noted in *West Haven Housing Authority* v. *Simmons, supra,* the record and briefs in this case comprise some 140 typewritten pages. Upon a review of the whole matter, we are satisfied that [the trial judge] was justified in concluding 'that this appeal is being taken for the purpose of delay.'" App. 69.

SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1969

Rector Simmons, Jr., et ux., Appellants, *v.* West Haven Housing Authority. | On Appeal From the Appellate Division of the Circuit Court of Connecticut.

[June 29, 1970]

Mr. Justice Douglas, with whom Mr. Justice Marshall joins, dissenting.

This was a summary procedure brought by a landlord [1] to obtain possession from his tenants for nonpayment of rent. The trial court found for the landlord and the tenants appealed.

Connecticut law requires one taking an appeal in such an action to post a bond with surety. The tenants showed they were financially unable to post the bond and claimed that to require a bond with surety to obtain an appeal would under those circumstances be a denial of equal protection. The trial court refused to waive the requirement for a bond with surety saying that "the appeal is for the purpose of delay."

The Circuit Court affirmed. The Appellate Division ordered the termination of a stay of execution. 5 Conn. Cir. 282, 250 A. 2d 527. The Supreme Court denied certification.

I would reverse this judgment. A rich tenant, whatever his motives for appeal, would obtain appellate review. This tenant, because of his poverty, obtains none. I can imagine no clearer violation of the requirement of equal protection unless it be *Griffin* v. *Illinois*, 351

[1] Respondent operates a federally assisted low-rent housing project under the authority of 42 U. S. C. § 1401 *et seq.* and Conn. Gen. Stat. § 8–38 *et seq.*

U. S. 12. Whether the case is criminal or civil, wealth, like race, is a suspect criterion for classification of those who have rights and those who do not. *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663; *Lee* v. *Habib*, — F. 2d —.[2]

What the merits of this tenant's appeal may be is not for us to say. But the appeal raised questions not easily answered. The terms of the lease stated that it could be terminated by not less than 30-days' notice, while apparently no more than five days' notice was given. A housing authority that is federally assisted has the right by 42 U. S. C. § 1404a "to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered." There is not a word in respondent's argument that indicates

---

[2] In that case Judge Skelly Wright, speaking for the Court of Appeals said:

"The limits of a state's duty affirmatively to equalize a defendant's ability to participate meaningfully in the judicial process are only now being sketched out in the cases. The picture is far from complete, but recent cases dealing with costs in divorce cases and transcripts on appeal from proceedings involving determination of parental rights, coupled with the expansive readings being given to *in forma pauperis* statutes, all suggest that the trend seems to be toward more, not less, affirmative action. Thus, while most of the cases extending equal protection to the judicial process have involved criminal proceedings, the constitutional mandate that there be no invidious discrimination between indigent and rich litigants is being recognized in civil cases as well.

"The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. Often a poor litigant will have more at stake in a civil case than in a criminal case." — F. 2d, at —.

that the federal regulations permit eviction on five days' notice where the lease requires 30 days' notice.

The case has been argued as if petitioner is a "cheap skate" seeking to get something for nothing. That simply is not true, for the record shows:

> "Mrs. Faulkner: Your Honor, may I urge upon you that if you grant our motion to have the defendants deposit the rent in court the landlord will not be hurt any further by delay in this proceedings. He will be protected because the monthly rent will be deposited. If he is successful on appeal he will be able to get the rent.
>
> "The Court: Do you suggest, if that should be the conclusion, that the clerk could issue an execution upon failure to pay?
>
> "Mrs. Faulkner: Yes.
>
> "The Court: In other words, you will be willing to stipulate on behalf of your clients that if the rent were not paid that the clerk would, may be empowered forthwith to issue an execution?
>
> "Mrs. Faulkner: Yes, Your Honor.
>
> "The Court: That appeal to you all right?
>
> "Mr. Philbin: Frankly it doesn't. During this period of time, it could take a considerable period of time, even if the tenant pays the fund into the clerk's office, they are not available to the plaintiff and we are still as a practical matter losing the rents during that period of time. Eventually if we prevail and get this money this would be an extended period of time."

Respondent represents that Connecticut's summary eviction statute is based on an English Act of 1737; and with all respect, the decisions below reflect an 18th century lawyer's approach to the task of protecting a landed interest. Every appeal of course entails delay; and in a

sense all appeals are antithetical to the spirit of summary eviction. But we live today under a different regime. Unlike 1737, appellate courts are no longer closed to the poor. Eviction laws emphasize speed for the benefit of landlords. Equal protection often necessitates an opportunity for the poor as well as the affluent to be heard. I disagree with the Court that the issue is not squarely presented in this case.[3] I would reverse this judgment.

[3] On review, the Connecticut court stated that a "sufficient bond with surety is essential to a valid appeal." But in the setting of the opinion, as I read it, that meant no more than a description of the normal manner of effecting an appeal. And the Connecticut court's insistence that the tenants did not lack "the economic power to make themselves heard in a court of law" refers to the fact that they were ably represented by attorneys for the New Haven Legal Assistance Association, Inc., a factor only emphasizing their indigency. Not a word in the opinions of the Connecticut courts suggests that the statutory bond requirement could not be waived.